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IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-334

NORMAN DANSKER, STEVEN HAYMES, and DONALD ORENSTEIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners, Norman Dansker, Steven Haymes and Donald Orenstein, pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit in these proceedings on June 2, 1976.

Opinions Below

The opinion of the United States Court of Appeals is reported at —— F.2d —— (3 Cir. 1976), and is printed

in Appendix A hereto at p. 1a. The opinion of the District Court of New Jersey is unreported, but is printed in Appendix B hereto at p. 47a.

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1976 (67a). A timely petition for rehearing was denied on July 7, 1976 (70a). The time for filing a petition for writ of certiorari was extended to and including September 3, 1976 (71a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Where multiple defendants are convicted of one substantive count of bribing A, another substantive count of bribing B, and an umbrella conspiracy count charging conspiracy to bribe both A and B; where prejudicial co-conspirator hearsay evidence and a vicarious liability instruction are presented to the jury under the conspiracy theory; and where the Court of Appeals reverses the conspiracy count and one of the substantive counts on the ground that the "criminal" conduct proven by the prosecution was entirely lawful; must not a new trial be ordered on the remaining substantive count?

Constitutional and Statutory Provisions Involved

United States Constitution, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exer- of the press; or the right of the people peaceably cise thereof; or abridging the freedom of speech, or

to assemble, and to petition the Government for a redress of grievances."

18 U.S.C. §1952:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, § 701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

Statement of the Case

1) Introduction

This petition raises a fundamental and recurring issue in the administration of appellate review of federal conspiracy convictions. Federal prosecutors are—with increasing frequency—bringing defendants to trial on a single umbrella conspiracy count coupled with several substantive counts. The conspiracy often charges—as it did here—no more than *an agreement* to engage in the identical conduct charged in the underlying substantive counts. For example, in this case multiple defendants were charged with bribing A (a substantive count); bribing B (a substantive count); and *also* a single conspiracy to bribe both A and B (the conspiracy count).

The issue in this case arises in the following familiar context: the case is tried under a conspiracy theory, thereby allowing a mass of otherwise inadmissible hearsay to reach the jury. The jury is also instructed—as it could not be in a non-conspiracy case—that each co-conspirator is criminally liable for all acts committed by any co-conspirator within the scope of the conspiracy. The jury then deliberates and finds all the defendants guilty of the conspiracy and the substantive counts. The court of appeals then *reverses the conspiracy count.*

The issue—presented in crystallized fashion by this case—is: under what circumstances does the reversal of the umbrella conspiracy count, without which prejudicial evidence and instructions would never have reached the jury, necessitate a new trial on the substantive counts.

In this case, the court of appeals not only held that reversal of the conspiracy count was required; it also held that reversal of one of the substantive counts was

required as well. It nevertheless affirmed the remaining substantive count, despite the fact that: A) most of the prejudicial evidence against petitioners came in under the co-conspirator exception to the hearsay rule; B) the judge's instruction invited the jury to convict the petitioners of the substantive count on a theory of co-conspirator vicarious liability which would not have been available in the absence of the reversed conspiracy count; and C) the prosecution was permitted to succesfully convince the jury that petitioners' conduct on the other two counts was criminal when in fact it was innocent. Moreover, it is extremely likely—on the record of this case—that the jury *in fact* convicted the petitioners of the remaining substantive count on the impermissible conspiratorial theory of *vicarious liability* for the acts of co-conspirators, rather than on the basis of any *direct* involvement in the acts charged in that count.

The federal appellate courts are confronting this recurring issue with greater frequency and are hopelessly in conflict and lacking authoritative guidance from this Court. This case—because of the clarity of the record—presents a perfect vehicle for this Court to provide that guidance.

2) The Indictment

Petitioners, Norman Dansker, Steven Haymes and Donald Orenstein, were convicted in the District Court of New Jersey upon a three-count indictment accusing them and others of conspiracy to violate the Travel Act, 18 U.S.C. §1952, and of two substantive violations of that same statute. The Court of Appeals reversed the convictions on one of the substantive counts (Count III),

vacated the convictions on the conspiracy count (Count I),[1] but affirmed the convictions on the other substantive count (Count II).

Count I charged a single conspiracy to use the facilities of interstate commerce to bribe two persons—Burt Ross, the mayor of Fort Lee, New Jersey; and Nathan Serota, vice-chairman of the Fort Lee Parking Authority. The alleged purpose of the two bribes was to bring about official approval for a commercial development known as the George Washington Plaza project, a real estate venture financed by the defendant Investors Funding Corporation (IFC), of which defendants Dansker, Haymes and Orenstein (hereinafter the "IFC defendants") were officers.

In addition to IFC and the IFC defendants, the conspiracy count named Valentine Electric Company and its two principals, Joseph Diaco and Andrew Valentine, as co-conspirators and Arthur Sutton as an unindicted co-conspirator. Sutton, a national real estate developer, had engaged with IFC in developing the George Washington Plaza project.

According to the indictment, the defendant Valentine met with Sutton in April, 1974, advised him that the project was facing serious opposition by the defendant Nathan L. Serota[2] and Fort Lee's Mayor, Burt Ross, and

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[1] The court remanded Count I for a new trial on a portion of the count or for dismissal of the entire count.

[2] Serota was described in the indictment as (1) vice-chairman of the Fort Lee Parking Authority, (2) an active opponent of the project before the Board of Adjustment, and (3) the backer of a slate of Fort Lee Council candidates who were seeking election based principally upon their opposition to the project. Serota was originally indicted on all three counts but the trial judge granted him a judgment of acquittal as to Counts I and II and the Court of Appeals reversed his conviction as to Count III.

offered to eliminate that opposition by payment of bribes in exchange for receiving the exclusive electrical contract for the project. The indictment alleged that as part of the conspiracy the IFC defendants told Sutton that IFC would provide the money to pay the bribes recommended by defendant Valentine. It was further alleged as part of the conspiracy that Serota agreed to withdraw his opposition and to assist in influencing official approval of the project in exchange for a bribe; and that defendant Diaco attempted to bribe Mayor Ross in order to obtain his assistance in securing the approval necessary for the development of the project.

The other two counts of the indictment charged as separate substantive crimes the same two briberies alleged to be the goal of the single conspiracy. Count II charged the attempted bribe of Mayor Ross; and Count III charged the bribe of defendant Serota. All of the co-conspirators indicted in the Count I conspiracy were also named as joint defendants in Counts II and III.

3) The Evidence

The record establishes that the evidence introduced as to both substantive counts together added up to the same evidence tendered to establish the single overall conspiracy. Indeed, the government put in its case in an undifferentiated, homogeneous fashion; there was no separation of proof between the substantive and the conspiratorial phases of the case, and no independent evidence concerning the dual bribes that was not also evidence concerning the conspiracy. Although the evidence introduced as to *each* of the two substantive counts differed with respect to the recipient, the form and the tim-

ing of the bribes (see 19a), both substantive counts alleged joint action among all the co-conspirators for the same purpose—to obtain the zoning variances needed for the project. (See 19a).[3]

While the IFC defendants were named along with the other indicted co-conspirators as direct participants in the substantive acts charged under both Counts II and III, there was no corroborative evidence linking the IFC defendants to Count II, the bribery of Mayor Ross.[4] There was substantial evidence that *some* persons attempted to bribe Ross, but none that the IFC defendants were involved in any way. The evidence concerning that count was based primarily on Mayor Ross' own testimony describing the offer to him of large sums of

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[3] Even the evidence pertaining to each of the substantive counts, although according to the Court of Appeals susceptible of compartmentalization (19a), was not truly separable. In sustaining the conviction on Count II (the bribery of Ross) despite its reversal on Count III (the bribery of Serota) the Court of Appeals stated:

> ". . . nearly all of the evidence concerning the defendants' dealings with Serota would have been admissible even if Count III had not been included in the indictment. The Serota transaction was an integral part of the defendants' scheme to obtain the variances needed for their project. Hence, evidence concerning it was clearly relevant to show the defendants' motive in approaching Ross with their proposition as well as their modus operandi." (19a)

[4] As to Count III, (which was dismissed on appeal) there was, substantial evidence establishing co-defendant Serota's agreement to withdraw his public opposition to the construction of the project in exchange for monetary payments, and the IFC defendants did not dispute their participation in this agreement.

money made by co-defendant Joseph Diaco and unindicted co-conspirator Arthur Sutton, to enlist his support for the project. That testimony was corroborated by numerous tape recordings which Ross had surreptitiously made of conversations between Ross and Diaco, Ross and Sutton, and Ross, Diaco and Sutton, capturing the bribery-offer in the raw. Neither Ross' testimony nor the tapes, however, incriminated any of the IFC defendants. Indeed the tapes contain explicit references to no one else knowing of the scheme to bribe Mayor Ross other than Diaco and Sutton.

The only evidence linking the IFC defendants to the Ross bribe was testimony provided by Sutton, the unindicted co-conspirator. That testimony, uncorroborated by tapes, documentary evidence or other witnesses, related various conversations Sutton allegedly had with the IFC defendants, either individually or in some combination, and conversations he had with co-defendants Valentine and Diaco out of the presence of the IFC defendants tying them into the bribery scheme.[5] As not all of the IFC defendants were present at all these conversations (and as none of them were present at some), the admissibility

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[5] In an effort to corroborate Sutton, the Government established through telephone toll records that there were telephone calls between Sutton and the IFC defendants at times when Sutton maintained he had criminal conversations with them; but Sutton himself admitted on cross-examination that he and the IFC defendants had much to discuss in the normal course of business and that many phone calls back and forth were customary in the normal course of the day.

of this prejudicial testimony rested squarely on the co-conspirator hearsay exception.[6]

4) The Charge to the Jury

The trial judge's charge tracked the government's theory and approach to the case. First, he erroneously—as the Court of Appeals found—submitted all three counts to the jury with respect to the IFC defendants. Second, he gave no cautionary instruction to consider the evidence under each count separately. Indeed, he did nothing to disentangle the substantive charges from the conspiracy charge so that they could be considered independently, but rather marshalled the evidence as it had been presented, in a homogeneous, unified fashion. Moreover, he charged that while there were two unlawful objects of the conspiracy (the bribery of Mayor Ross and the payments to Serota), the government need only establish a

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[6] That Sutton had a motive to ensure conviction of the IFC defendants cannot be doubted. Originally, under the first indictment in this case, only Sutton and Diaco were indicted for conspiracy to bribe Mayor Ross (based on Ross' testimony and tapes). Then, after Sutton was permitted to plead guilty to a lesser offense in exchange for his agreement to furnish evidence on behalf of the government, the first indictment was dismissed, and the second indictment, accusing the IFC defendants and dropping charges against Sutton, was issued. At the time of Sutton's testimony more than half a year had elapsed since his guilty plea to the reduced charge, but he was still unsentenced. Moreover, he freely conceded that he hoped to win the leniency of the court by his testimony, and grudgingly admitted that he might have said that he expected nothing more than a slap on the wrist. By the end of the case even the prosecution was forced to recognize that Sutton had come to court "seeking to curry favor."

conspiracy to accomplish *either one* of these objectives to sustain its burden of proof on the conspiracy count. Third, he gave no cautionary instruction not to take into consideration proof against one defendant and apply it to any other defendant, nor to limit consideration of each individual defendant's guilt to evidence of direct participation and events actually observed. On the contrary, apart from giving the standard kind of instruction allowing consideration of evidence of co-conspirator hearsay declarations (whether the declarant was an indicted or unindicted co-conspirator), the trial judge specifically instructed that if the jury finds a conspiracy (which it erroneously did), it may conclude that each member of that conspiracy (whether indicted or unindicted) was the agent of every other member; that the acts of any one member of a conspiracy in furtherance thereof are deemed to be the acts of all and all are responsible for such acts; and that responsibility exists even though such acts were done without the knowledge of a fellow conspirator.

After a lengthy trial, the jury convicted all of the defendants on all of the counts, and the trial judge sentenced the IFC defendants to concurrent terms of imprisonment for a period of five years on each count.

5) Appellate Review

On appeal, the Third Circuit held that under the only interpretation of the relevant substantive law of bribery which will not "run . . . afoul of the First Amendment"

(11a),[7] the payments to Serota simply did not amount to criminal bribery. The court concluded that since Serota was approached only in his capacity as a private citizen and as "the leader of the . . . biggest portion of the opposition" (15a), his agreement to reverse his prior stance against the project in exchange for money carried with it no threat that he could "subvert the integrity" or corrupt the decision-making processes of any governmental entity (*id.*), and moreover, fell within the ambit of his First Amendment rights[8] (16a). Having concluded that Serota's receipt of payments were lawful, the Court recognized that the evidence under Count III was insufficient to support any convictions for bribing Serota. It therefore reversed the convictions as to all of the defendants under that count and remanded for entry of judgments of acquittal.

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[7] As Count III charged a violation of the Travel Act (which makes it a federal offense to use interstate commerce "to further any unlawful activity" such as "bribery . . . in violation of the laws of the state in which committed . . .") by the commission of bribery under the laws of New Jersey, the Court of Appeals examined New Jersey statutory and common law to determine the proper definition of "bribery" to be applied. It held that in order to establish a violation of the New Jersey law it must be demonstrated: "(a) that the alleged recipient, whether he be a public official or not, possessed at least the apparent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would undermine the integrity of that public action." (14a).

[8] The court found that "the government failed to produce any evidence whatsoever indicating that Serota had any ability, actual or apparent, to influence the particular public action involved in his official capacity, or that the alleged bribers believed he could do so by virtue of his public office," (14a), and that indeed, there was no record evidence that the alleged bribers were even *aware* of Serota's obscure public office.

The reversal of the Serota-substantive count required the Court of Appeals to examine the impact on the other two counts of the indictment of the jury's finding of guilty on that now-defunct count. As to the conspiracy count, the court recognized, as it had to, that it was impossible to determine whether the jury's general verdict of guilty on that count had been based on a theory which was "sufficient to justify conviction" (the attempted bribery of Ross), or one that was not (the payments to Serota). (17a). As noted earlier, the trial judge had "instructed the jury that if it found that the alleged conspiracy had as its illegal object *either* the bribe of Ross or Serota it could convict the defendants" (17a, emphasis in original). While the government argued on appeal that the jury's verdict on Count II—the Ross bribery—showed that it must have determined that the Ross bribe was at least one of the Count I conspiracy objectives, the Court of Appeals disagreed, holding that "the possibility . . . remains, albeit slim, that the jury found that the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II." (17a, 18a). Given this possibility, the Court could not allow the Count I conviction to stand and so it vacated all convictions under that count and remanded for a new trial or dismissal.

As to Count II, the Court of Appeals cursorily examined the compartmentalization of evidence between the two substantive counts, and concluded that "[a]lthough the district court did err in submitting Count III [the Serota substantive charge] to the jury, we do not believe that its error so tainted the jury's deliberations on Count II [the Ross substantive charge] that a reversal of the defendants' convictions for bribing Mayor Ross is in order." (19a). The Court did not, however, examine the compartmentalization of evidence—or lack there-

of—between the *conspiracy* count and the Ross-substantive count. Indeed, the Court totally ignored the spill over effect from the conspiracy count onto that substantive count and accordingly it upheld the convictions on Count II.

REASONS FOR GRANTING THE WRIT

Courts have recognized that when multiple defendants are tried under an umbrella conspiracy theory coupled with nearly identical substantive counts, and the conspiracy count is later rejected, there is a grave danger that the rejected conspiracy count may have seriously prejudiced the right of an individual defendant to an individual determination of guilt on the substantive counts. See *Blumenthal* v. *United States,* 332 U.S. 539, 559-560 (1947); *United States* v. *Branker,* 395 F.2d 881, 888 (2nd Cir. 1968). This prejudice may take several forms: the jurors may transfer guilt from one co-defendant to another under a vicarious liability instruction which would never be given absent the conspiracy theory; they may rely upon evidence admitted under the co-conspirator exception to the hearsay rule in determining the guilt of a co-defendant against whom such evidence would not be admissible absent the conspiracy theory; and in their deliberations on the substantive counts, they may be influenced negatively by their erroneous guilty verdict on the conspiracy count.

With the growing and much criticized use of federal indictments which meld and interweave conspiracy and substantive counts, the federal courts of appeals have been forced increasingly to confront the problem of whether to reverse or to sustain substantive counts when the um-

brella conspiracy theory under which those counts were tried is ultimately dismissed or reversed.

There are three general contexts in which the problem of prejudice resulting from the later invalidation of a conspiracy theory arises: 1) where the *trial judge,* after admitting evidence under the co-conspirator exception to the hearsay rule subject to being found tied to a conspiracy, later dismisses the conspiracy count for failure of proof, and the jury convicts on the substantive counts; 2) where the *jury,* after hearing evidence admitted under the co-conspirator exception to the hearsay rule and receiving appropriate instructions not to consider that evidence unless found to be tied to a conspiracy, then acquits on the conspiracy count but convicts on the substantive counts; and 3) where the *appellate court,* upon reviewing a jury's conviction under both the conspiracy and substantive counts, reverses the conspiracy count, in a situation where a mass of evidence was admitted under the co-conspirator exception and vicarious liability instruction was given.

Plainly, the third class of cases raises the most serious spectre of prejudice to the defendant's right to an individual determination of guilt. In that situation, the trial judge, not realizing the invalidity of the consipracy theory at the time he gives the case to the jury, will almost certainly fail to give adequate precautionary instructions and to marshall the evidence in such a way so as to guard against the spill-over prejudice from the conspiracy count. As the Second Circuit Court of Appeals noted in *United States* v. *Bentvena,* 319 F.2d 916, 955:

> There appears to us far greater likelihood of prejudice here [when all counts, including the conspir-

> acy, are submitted to the jury which convicts on all counts] than in a case where the jury has weighed the evidence of conspiracy and found it wanting, or where the Court has so found and warned the jury to disregard it.

This case is a paradigm of the third kind of situation. Indeed, because of the homogeneous, unified nature of the evidence and the trial judge's instructional failure to differentiate between the counts and between the defendants, this case raises the problem of whether to reverse or sustain extant substantive convictions after appellate invalidation of the conspiracy charge in a most extreme, crystallized form. The great prejudice arising from trial of the IFC defendants under an erroneous conspiracy theory is apparent on the record of the case—and none of the protective safeguards designed to minimize those prejudicial effects were operative. This unrestrained prejudice took three forms, each alone sufficient to require reversal.

1) Transfer of guilt under theory of vicarious liability.

In this case, rather than instructing the jury in a manner designed to minimize the possibility that the jurors would "transfer guilt from one [defendant] to another" (see *United States* v. *Vanelli*, 407 F.2d 735, 747 (7th Cir. 1969)—by informing them "not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant" [see *Schaffer* v. *United States*, 362 U.S. 511 (1960)], the trial judge did precisely the opposite. He charged that as long as the jury found a conspiracy, it could impute the acts of any co-conspirator (indicted or unindicted) to any other mem-

ber of the conspiracy.[9] Under this charge, the jury once having decided that at least one co-conspirator had committed a particular criminal act, was free to find all the other members of the conspiracy guilty of the same act—without relying on a single piece of evidence directly implicating any of those others.

Since the jury in this case did in fact find the existence of a conspiracy, it must be presumed that the vicarious liability instruction became an operative factor in the jury's deliberations. Moreover, in light of the appellate reversal of the conspiracy count, and for the purposes of this petition, it *must* be presumed that the jury found the IFC defendants conspired solely to bribe Serota (a non-crime) and not to bribe Ross (a crime). Given that presumption, there are only two possible explanations for the jury's guilty verdict on Count II. First is the explanation accepted by the Court—namely, that despite its finding that the IFC defendants did not *conspire* to bribe Ross, the jury did find that the IFC defendants *attempted* to bribe Ross.[10] The second explanation—and the one urged by the petitioners here—is far more logical, and on the record of this case is, indeed, compelling. It is simply that the convictions of the IFC

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[9] In addition, the language of the indictment itself emphasized the interwoven nature of the Count I and II charges; it specifically alleged that the Count II offense was committed "in furtherance of the plan and purpose to commit the offense charged in Count I" and the jury was so informed.

[10] Although the Court of Appeals tried to justify such a conclusion as "neither illogical or impossible" (*Id.*, at 18a), it is in fact difficult to imagine how a group of at least six men (Dansker, Haymes, Orenstein, Diaco, Valentine and Sutton) could have engaged in acts of offering a bribe without also engaging in a conspiracy to do so.

defendants on Count II rested entirely on the theory of vicarious liability for the acts of co-conspirators, and not at all on the individual determination of their guilt. Under this theory—which the jury was instructed to apply—the jury may well have convicted the IFC defendants of bribing Mayor Ross *solely by imputing to these defendants* the corroborated and undisputed attempts by "co-conspirators" Sutton and Diaco to bribe Ross.

On the factual record of this case it is highly likely that the jurors did indeed rely on the vicarious liability theory to convict the IFC defendants on Count II. The government's case against the IFC defendants on that count was based entirely upon the uncorroborated testimony of the co-conspirator Arthur Sutton, who had been caught cold on tape bribing Mayor Ross and who, on the record of this case (see p. 10, n. 6, *supra*) had strong motivations to shift the weight from himself by convincing the prosecution that there were others, higher up the ladder, against whom he was willing to testify. When the jury learned that Sutton eventually decided to "cooperate" with his prosecutors, that he was permitted to plead guilty to a single count Information, that sentencing was deferred until after his testimony, and that he expected a slap on the wrist at that sentencing, the jury could well have found that he was merely working his passage and was not to be believed.

Consequently the jury may well have rejected Sutton's testimony *entirely* and believed only Ross and the tapes with respect to Count II.[11] If this is so—and such a possi-

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[11] The jury's conviction on Count III is also entirely consistent with a rejection of Sutton's testimony. There was ample documentary evidence establishing Serota's agreement to accept money and Sutton's testimony added nothing essential.

bility is not only entirely consistent with the jury's verdict on all counts but, given the massive attack on Sutton's credibility throughout the trial,[12] is a real possibility—the jury's conviction of the IFC defendants on Count II would have had to rely, not on evidence of *their* direct participation *in bribing Ross,* but rather on their participation *in the alleged Serota conspiracy* (a non-crime) coupled with their *vicarious liability* for the acts of their co-conspirators Sutton and Diaco. *Once having decided that the IFC defendants were guilty of a conspiracy to bribe Serota involving Sutton and Diaco, it was entirely logical for the jurors to follow the court's instruction and to impute to the IFC defendants the tape recorded criminal acts of Sutton and Diaco in offering to bribe Ross.* It is clear that if this is what the jury in fact did, then the convictions of the IFC defendants on Count II rested entirely on the jury's impermissible conclusion that there was a conspiracy to bribe Serota.

In any event, regardless of what the jury did in fact, it must be assumed as a matter of law that the jury relied on the theory of vicarious liability in reaching its decision on Count II. The law is well-settled that when a general verdict is returned and one of the possible grounds of that verdict is later invalidated, the conviction under that verdict must be struck down. See, e.g., *Stromberg* v.

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[12] As the Court of Appeals noted, "the jury was fully aware of his [Sutton's] prior conviction, his expectations of leniency and his previous unlawful activities. In addition, his credibility was repeatedly and severely assailed from every conceivable angle over a cross-examination which covered more than 1,100 pages of a 2,600 page transcript." (36a).

California, 283 U.S. 359, 367-368 (1931).[13] Indeed, it was on that principle that the Court of Appeals in this case reversed Count I which was "submitted to the jury on alternative theories, only one of which in retrospect, was sufficient to justify a conviction." (17a).

Count II was also submitted to the jury on alternative theories—the IFC defendants' *direct* involvement in bribing Ross; *or* their *vicarious liability* for Sutton and Diaco's acts—only one of which was sufficient to justify a conviction. The inherent prejudice arising from the possible operation of the insufficient theory—on a record devoid of instructional safeguards—mandates reversal of this count. That the Court of Appeals failed to reverse Count II is inconsistent not only with its own decision in this case with respect to Count I; it is in direct conflict with the overwhelming majority of courts. See n. 13, *supra*.

2) Admission of Evidence Under Co-conspirator Exception to the Hearsay Rule.

In reliance upon the existence of the conspiracy count, the trial judge allowed into evidence many co-conspirator

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[13] The principle in *Stromberg* v. *California* has been consistently followed both in the context of constitutional claims [see e.g. *Williams* v. *North Carolina*, 317 U.S. 287 (1942); *Cramer* v. *United States*, 325 U.S. 1, 36 n. 45 (1945); *Terminello* v. *City of Chicago*, 337 U.S. 1, 5-6 (1949); *Yates* v. *United States*, 354 U.S. 298, 311 (1957); *Leary* v. *United States*, 395 U.S. 6, 31 (1969) and *Bachellar* v. *Maryland*, 397 U.S. 564, 569-571 (1970)] as well as in non-constitutional claims [see e.g. *United States* v. *Cantone*, 426 F.2d 902 (2nd Cir. 1970), cert denied, 400 U.S. 827 (1970); *United States* v. *Aloi*, 511 F.2d 585, 597 (2nd Cir. 1975) cert. den. —— U.S. ——; *United States* v. *Dickerson*, 508 F.2d 1216 (2nd Cir. 1975); *Samuel* v. *United States*, 169 F.2d 787, 798 (9th Cir. 1948)].

hearsay declarations uttered out of the presence of one or more of the IFC defendants. These otherwise inadmissible hearsay statements were of a highly prejudicial nature, particularly concerning Count II. Thus, the numerous tape recordings of conversations among Ross, Sutton and Diaco, which established in detail the efforts by Sutton and Diaco to bribe Mayor Ross were admitted in evidence *against the IFC defendants* even though not one of those defendants (Haymes, Dansker or Orenstein) were ever a party to these conversations.

Moreover, Sutton was allowed to testify to the substance of what the other co-conspirators, Valentine and Diaco, had told him out of the presence of the IFC defendants.[14] A selection of some of these co-conspirator's hearsay declarations, which dramatize the prejudice suffered by the IFC defendants, are set forth in the margin.[15]

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[14] Sutton was also allowed to describe conversations in which only one or another of the three IFC defendants were present or participating even though these conversations were held against *all the IFC* defendants.

[15] Conversation between Sutton and Valentine related by Sutton at V, 1379-1382:

A. Mr. Valentine said to me that we had two major problems; one was Serota's opposition.
Q. Referring to whom, sir?
A. Nathan Serota, his opposition to the project and Mayor Ross'—and Mayor Ross as the other problem, to get it passed.
Mr. Valentine said both could be accomplished. We had to purchase Mr. Serota's apartment for $900,000 and Mayor Ross was to receive $200,000 and there were $300,000 to be extended to other people in the town.

(Footnote continued on following page)

(Footnote continued from preceding page)

Q. Now, $900,000 to buy Mr. Serota's apartment. Is that correct?
A. That is correct.
Q. What was the 200—what was the form the $200,000 to be paid to Mr. Ross was to take?
A. In cash.
Q. What form was the $300,000 to other people in town to take, sir?
A. In cash.
Q. What do you say to Mr. Valentine, sir?
A. I said I'd have to go back to the bank and verify, see—
Q. What—continue.
A. To see if this money was available. And Mr. Valentine—
Q. What did Mr. Valentine say?
A. *He said, "what are you worried about, Mr. Norman Dansker [one of the IFC defendants] has all the money in the world."*

* * *

Q. After Mr. Valentine tells you that Mr. Dansker had all the money in the world, what next happened, any further conversation?
A. No, no further conversations after that.

Conversation between Sutton and Diaco, related by Sutton at V, 1560:

A. Mr. Diaco was—said he was going to arrange a meeting in New York with Mayor Ross, a luncheon meeting. And I said, "Fine. *I'll have Don Orenstein [one of the IFC defendants] meet with us and we'll meet at Club Cavallero and we'll discuss the possibility of not having the meetings terminated that evening."*
Q. Did you have another conversation with Mr. Diaco that day?
A. Mr. Diaco calls me back.
Q. Calls you back?
A. Yes. Or I call him. I don't remember. And Mr. Diaco tells me that there is going to be a meeting later in the afternoon about two or three o'clock.

(Footnote continued on following page)

Had the government failed to offer sufficient evidence regarding the participation of the IFC defendants in the alleged conspiracy, the trial judge would have been required to instruct the jury to disregard these hearsay conversations as to those persons found not part of the conspiracy. *United States* v. *Geaney,* 417 F.2d 1116, 1120 (2nd Cir. 1969) cert. den. sub nom *Lynch* v. *United States,* 397 U.S. 1028 (1970); *United States* v. *Bey,* 437 F.2d 188, 191 (3rd Cir. 1971). Here, of course, no such instruction was given since the trial judge was operating

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(Footnote continued from preceding page)

Q. A meeting between whom and whom?
A. Between Mayor Ross, myself, Mr. Diaco and Don Orenstein.

Conversation between Sutton and Diaco, related by Sutton at V, 1563, 1564:

A. Mr. Diaco said that he, the Mayor, ran out of the office all upset. Mr. Diaco said that he was talking to the Mayor and there was a knock on the door and he opened the door and Mr. Orenstein and Mr. Cutrupi were standing outside.

Then the Mayor started to raise his voice, "What are you doing here"? That is what Mr. Diaco said to me?

And he closed the door and he went back in with the Mayor.

Mr. Diaco said that in a few minutes the Mayor got up, ran out of the door. *Mr. Diaco said he ran after him and Mr. Orenstein screamed at him, "Pay him a million dollars."*

And then Mr. Diaco, Mr Diaco ran after the Mayor and Mr. Orenstein and Mr. Cutrupi were running after Mr. Diaco.

This is the conversation that I had with Mr. Diaco when he returned to my office.

under the assumption that a proper conspiracy case had been presented to the jury.

Nor did the trial judge limit the admissibility of the co-conspirator conversations just to the conspiracy count. Instead, the trial judge here allowed the hearsay declarations of co-conspirators to be used against the IFC defendants in the substantive counts as well. In *United States* v. *Branker,* 395 F.2d 881, 888-889 (2nd Cir. 1968) where the conspiracy count was dismissed at the close of the government's case and the jury convicted on the substantive counts, the Court of Appeals found that even though the trial judge had limited the hearsay statements of a co-defendant solely to "the question of whether the substantive offense had been committed" and had instructed against considering that evidence "on the question whether the defendant aided and abetted," the prejudice to the defendant from presenting the jury with this evidence and, indeed, with the whole subsequently dismissed conspiracy theory was "so great" that "no amount of cautionary instructions could have undone the harm." *Id.,* quoting *United States* v. *Kelley,* 349 F.2d 720, 758 (2nd Cir. 1965) cert. denied, 384 U.S. 947 (1966). Here, no cautionary instructions were given limiting the hearsay in any way, it must be assumed therefore that the co-conspirator declarations permeated the entire trial.

The conspiracy theory provided the sole vehicle—the co-conspirator exception to the hearsay rule—justifying the admissibility into evidence of these conversations. When the Court of Appeals reversed the conspiracy count, that vehicle disappeared and no other legitimate vehicle existed to convey these hearsay statements into evidence on Count II, the bribery of Mayor Ross. *Bruton* v. *United*

States, 391 U.S. 123 (1968). See *Dutton* v. *Evans,* 400 U.S. 740 (1970).

In *United States* v. *Bentvena,* 319 F.2d 916, 955 (1963) the Court of Appeals for the Second Circuit recognized the extreme prejudice arising from the admission of co-conspirator hearsay evidence with respect to substantive counts in a case in which the court also reversed the convictions on the conspiracy count on appeal. The Court noted that:

> All counts were submitted to the jury, which found defendants guilty of conspiracy on evidence that we have unanimously held to be legally insufficient, and then considered the mass of hearsay declarations of purported co-conspirators against them.

The Court then concluded that the prejudice would be great indeed, and reversed the convictions on the substantive counts. The approach of the Third Circuit in this case conflicts squarely with that of the Second Circuit.

3) Impact on Substantive Count of Guilt Determination on Conspiracy.

As noted *supra,* p. 17 in light of the appellate reversal of the conspiracy count, it must be assumed for purposes of this petition that the jury's determination of guilt on that count was made solely on the basis of the conspiracy to make payments to Serota—a non-crime. There is no doubt that a large part of the total evidence submitted to the jury dealt with that conspiracy and that, consequently, the jury was inundated with evidence of transactions which were lawful—indeed constitutionally protected—but were wrongly characterized as "criminal."

Moreover, it is virtually certain that the jury deliberated upon and came to a decision on the conspiracy count first, before deliberating on the substantive counts. The jury had been instructed quite clearly that its ability to impute guilt to co-defendants through a vicarious liability theory and its ability to rely on the hearsay declaration of co-conspirators was *conditional* upon its making a determination, in the first instance, that a conspiracy existed and that the defendants were part of it. Given those instructions, *the only logical way for the jury to proceed was to make its decision concerning the conspiracy count before it deliberated upon the substantive counts.*[16]

Nor is there any doubt that the trial judge's instructions failed utterly to admonish the jury to separate the evidence concerning the conspiracy from that concerning the substantive charges and to limit its deliberation on guilt under each count carefully to the evidence concerning that count solely.

While the Court of Appeals found that "the evidence concerning the two bribes was of such a nature that it could be easily compartmentalized by the jury and then considered independently by it under each count of the indictment" (19a), the Court did *not* make the same finding with respect to the evidence concerning the *substantive attempt to bribe Ross* on the one hand, and the *conspiracy to bribe Serota and Ross* on the other. Nor could it have, as the evidence in this case was simply not split by presentation or instruction in that fashion.

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[16] It is also logical to assume that the jury probably considered Count III—where the evidence was primarily undisputed documents—before Count II, which was the most hotly contested factually and rested entirely (at least as regards the IFC defendants) on the uncorroborated testimony of an unindicted co-conspirator seeking to curry favor with the government.

This Court and others have recognized that when there is a possibility of confusion or prejudice from joinder of two counts, one of which is subsequently invalidated, the otherwise valid count may be saved only by a "strict" charge segregating for the jury the "evidence which was available in the consideration of the guilt of each petitioner separately under the respective substantive counts." *Schaffer* v. *United States,* 362 U.S. 511, 516 (1960). See *United States* v. *Johnson,* 515 F.2d 730, 735 (7th Cir. 1975). Here, in the absence of any segregating instructions whatsoever, it must be assumed that when the jury was deliberating on the substantive bribery of Ross it bore closely in mind the guilty verdict it had already reached—albeit improperly—on the overall conspiracy charge and that the first guilty verdict had a telling effect on the surviving substantive count.

The prejudice from such a transfer of guilt is plain. As the Court of Appeals for the Second Circuit noted in reversing the substantive conviction after appellate reversal of the conspiracy count in *United States* v. *Bentvena,* 319 F.2d at 955:

> The jury . . . could hardly have given their defense the same consideration after they were erroneously found to be narcotics conspirators as it would have had they been tried on the substantive counts alone . . . The mass of conspiracy evidence militated against their credibility and towards their guilt.

The Third Circuit's refusal here to recognize the "possibility that the jury relied on improper evidence in reaching its guilty verdict on Count II" (19a) is, once again, thoroughly inconsistent with the approach of the

Second Circuit in *Bentvena*. See also *United States* v. *Branker*, 395 F.2d 881 (2nd Cir. 1968).[17]

Also, the spill-over prejudice suffered by the defendants from the jury's determination of guilt on the conspiracy charge is especially compelling where, as here, that charge encompassed activities protected by the First Amendment. In determining whether the defendants were guilty of "bribing" Serota the jury had nothing to consider but the transaction surrounding Serota's decision as a private citizen to change his public position on a town zoning matter in exchange for money. This transaction, recognized by the Court of Appeals to fall within the scope of the First Amendment (11a, 16a), was none-

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[17] The approach of the Seventh Circuit with respect to this issue appears to be essentially the same as that of the Second. Although the Court in *United States* v. *Johnson*, 515 F.2d 730, 736 (7th Cir. 1975) concluded that "a fair analysis of the entire record leads assuredly to the conviction that the error [presenting the jury with a conspiracy theory which was invalidated on appeal] could at most have had but a very slight effect on the jury's verdict on the substantive counts," it did so on a factual record that was thoroughly different from that of the case at bar. Rather than a situation, as here, in which the evidence concerning the substantive counts was virtually identical to the evidence concerning the conspiracy count, in *Johnson* the evidence on two of the three substantive counts (under which the defendant Johnson was charged alone) was entirely independent of the evidence on the conspiracy count, and as to the third substantive count, the slight overlap in evidence with the conspiracy count could not have mattered since the co-defendant under that count, about whom that overlapping evidence focussed, was *acquitted* of the substantive count. *Id.*, at 733, n. 8, 736. In fact, the Court specifically noted that there was no evidence that would have been inadmissible against Johnson, but for the erroneous conspiracy theory which "in any way related to the transactions that formed the basis for these substantive counts." *Id.*, at 733, n. 8.

theless labelled, and presented to the jury by the government and by the trial judge, as "criminal."[18]

Other courts faced with the inclusion of constitutionally protected activity within an umbrella conspiracy charge have, unlike the Third Circuit Court of Appeals in this case, recognized the special prejudice to the defendants.

Thus in *United States* v. *Johnson,* 337 F.2d 180 (4th Cir.) aff'd on other grds., 383 U.S. 169 (1966) and on remand, 419 F.2d 56 cert. denied, 397 U.S. 1010 (1970), the Fourth Circuit, after setting aside a conviction on a conspiracy count because it encompassed activity protected by the Speech and Debate Clause, ordered a new trial on the substantive counts on the grounds that the

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[18] The trial judge considered the conduct charged in the Serota transaction as even more represensible than that charged in the Ross bribe (Count II). This attitude, reflected throughout the trial, was evidenced in the judge's statement to Serota at sentencing:

> "Your conduct was despicable. You not only showed an unconcealed contempt for the people of Fort Lee, you betrayed the government which you are part of. You prostituted yourself and your cause. You . . . sold out the people who believed that you, Nathan Serota, was (sic) devoted to the government. . . . You were cunning. You were shrewd. You were greedy, and you were corrupt. You had no need for more money. You had all you could ever require. But your flabby morality would not allow you to pass up what must have seemed to you a heaven-sent opportunity to add to your immense wealth. You are the one defendant, had you been in the other counts, that I would have given serious consideration to imposing consecutive sentences on. As it is, you are a defendant only in Count III." (A. 1254-1255).

The Court of Appeals while finding the Serota transaction to be constitutionally protected, also characterized it as "reprehensible."

introduction of evidence concerning constitutionally protected speech had *possibly* prejudiced the jury in its deliberations on the substantive counts. The Court stated, 337 F.2d at 204:

> "Though we find the evidence sufficient to support a guilty verdict on all counts, the invalidity of count one [conspiracy] as applied to Johnson was obviously prejudicial to his right to the unbiased consideration of the jury on the remaining counts. Many of the events testified to at trial related only to the speech. It was introduced into evidence and its authorship, contents, motivations and accuracy made the subject of extensive inquiry. The conclusion is unavoidable that this mass of evidence and comment, all inadmissible against Johnson, infected the jury's consideration of his innocence or guilt under the conflicts of interest counts. The judgment against Johnson is therefore vacated and the case remanded for a new trial on the [substantive] counts . . ."

The First Circuit too has recognized and warned against the special prejudice which may result from the introduction of First Amendment protected activity in a conspiracy trial because of the vicarious linking of individuals who engage in protected activity with those who engage in crime. *United States* v. *Spock,* 416 F.2d 165 (1st Cir. 1969).

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In sum, the record of this case demonstrates with striking clarity three major elements of prejudice arising from the trial of substantive charges under an umbrella conspiracy theory which is later invalidated. The IFC defendants now stand convicted of a substantive charge of bribery: 1) on the basis of vicarious liability for the ac-

tions of others pursuant to a conspiracy charge which was reversed on appeal; 2) on the basis of conversations and hearsay declarations of others which would not have been admissible against them but for the conspiracy charge which was reversed on appeal; and 3) on the basis of jury deliberations which were tainted by a determination of guilt (encompassing protected First Amendment activity) on that same conspiracy charge which was reversed on appeal.

Had there been no conspiracy, the case against the IFC defendants would have been very different indeed: there would have been no vicarious liability for the acts of Diaco, Valentine and Sutton; no admission against them of the tape recordings of conversations between Ross and Sutton, Ross and Diaco, and Ross, Sutton and Diaco actually establishing the occurrence of the bribery; no admission against them of the hearsay declarations of Diaco, Valentine and Sutton implicating one or another of them in their absence; and no psychological impact on the jury from its own determination of guilt under an umbrella conspiracy count. In fact, absent the conspiracy theory, the only evidence against the IFC defendants would have been the uncorroborated testimony of Arthur Sutton, one of the two principals caught cold on the Mayor's tape, who had pleaded guilty to a reduced charge in exchange for naming others not on the tape, and whose credibility had been subject to a massive attack at trial. As the record now stands, the jury may well have convicted the IFC defendants of the Ross bribery *without believing one word of Sutton's testimony.* It simply cannot be assumed that if the jury had heard only the uncorroborated Sutton testimony, it would have convicted the IFC defendants of bribing Ross. Surely an error which changes the complexion of the proof so drastically cannot be passed off as harmless. As Mr. Justice Rutledge, writing for the

Court in *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946) stated:

> . . . if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

The problem of whether or not to reverse substantive convictions obtained in the context of a conspiracy theory when the conspiracy convictions are reversed on appeal, is an increasingly frequent and common issue in the federal courts, but no definite guidelines or standards have been set. This case—because of its clear record of demonstrable prejudice and absence of precautionary safeguards—is a perfect case for this Court to articulate standards for when a substantive count must be reversed for a new trial after an appellate court has reversed an umbrella conspiracy charge.

CONCLUSION

There are two additional factors present in the case which militate in favor of granting the relief sought by petitioners.

First, on appeal petitioners presented to the Court of Appeals a substantial claim for a new trial under *Brady* v. *Maryland,* 373 U.S. 83 (1963). In brief, it was that the

Government deliberately failed to disclose to the defense or to the trial court—despite repeated specific pre-trial requests—the existence of one James Silver and the substance of information of great value to the defense disclosed by him to the very United States Attorney and Assistants prosecuting the case. The Court of Appeals acknowledged that "defendant's allegations concerning Silver, if true, are relevant to the establishment of cause for a new trial." (A. 45-46). Despite the fact that the Government concedes the basic facts—that it received multiple communications from Silver and deliberately decided not to disclose them either to the defense or the court—the Court of Appeals declined to review the claim on appeal and instead directed that the entire matter should be presented to the district court.

Under that direction, an extensive evidentiary hearing —indeed a virtual mini-trial—might well be required. Considerations of judicial economy and of justice strongly suggest that it would be far better to require a new trial on the single remaining count of the indictment. At that new trial, defendants will have available the benefit of the Silver information which was deliberately concealed from them at the first trial. And they will be tried without the prejudice that inevitably resulted from the joinder of counts that were later reversed by the Court of Appeals. Accordingly, the existence of this substantial *Brady* issue should eliminate any doubts concerning the need for a new trial on the single remaining count.

The second additional factor strongly supporting review in this case is that the major issue presented in this petition—the effect of the Court of Appeals reversal of the conspiracy and one substantive count on the remaining substantive count—could not have been argued thoroughly before the Court of Appeals issued it's opinion.

Counsel simply could not have anticipated the precise nature of the Court of Appeals' opinion, reversing the conspiracy and one substantive count. A petition for rehearing was quickly denied without opinion. Surely this argument, over which the circuits have divided, deserves consideration on the merits by some court. Accordingly, this Court—if it decides against plenary review—should, at the very least, remand the case to the Third Circuit for briefing and full argument on this important issue. It is petitioners' basic contention however, that—for the reasons stated above—this case is ideally suited for plenary review by this Court.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1685/92

UNITED STATES OF AMERICA

v.

NORMAN DANSKER, JOSEPH DIACO, STEVEN HAYMES, WARNER NORTON, DONALD ORENSTEIN, NATHAN L. SEROTA, ANDREW VALENTINE, INVESTORS FUNDING CORPORATION OF NEW YORK, VALENTINE ELECTRIC COMPANY,

Norman Dansker, Appellant in No. 75-1685

Joseph Diaco, Appellant in No. 75-1686

Stephen Haymes, Appellant in No. 75-1687

Donald Orenstein, Appellant in No. 75-1688

Nathan L. Serota, Appellant in No. 75-1689

Andrew Valentine, Appellant in No. 75-1690

Valentine Electric, Appellant in No. 75-1691

Investors Funding Corp. of New York, Appellant in No. 75-1692

(D.C. Criminal No. 74-555)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued February 4, 1976

Before SEITZ, *Chief Judge,* VAN DUSEN and WEIS, *Circuit Judges.*

Appendix A

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OPINION OF THE COURT

(Filed June 2, 1976)

SEITZ, *Chief Judge.*

The defendants Dansker, Haymes, Orenstein, Diaco, Valentine, Valentine Electric, and Investors Funding Corporation were convicted under a three count indictment charging them with conspiracy to violate the Travel Act, 18 U.S.C. § 1952, and with substantive violations of the statute. Count I alleged that they had conspired to utilize the facilities of interstate commerce to bribe Burt Ross, the mayor of Fort Lee, New Jersey, and the defendant Nathan Serota, vice-chairman of the Fort Lee Parking Authority, in order to gain zoning variances and other official approvals which would permit the construction of a large shopping center complex in Fort Lee. The remaining counts of the indictment charged them with the bribe of Ross (Count II) and the bribe of the defendant Serota (Count III). The remaining defendant, Serota, was convicted solely under Count III of the indictment which charged him with accepting a bribe in violation of New

Appendix A

Jersey law. The defendants have appealed, alleging numerous infirmities in their convictions.

THE FACTUAL BACKGROUND:

The evidence, viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60 (1942), may be summarized as follows: Fort Lee, N.J., is a community of approximately 40,000 residents located at the western terminus of the George Washington Bridge. In 1971, Arthur Sutton began acquiring real estate in that community for commercial development. His efforts were financed to a large extent by the defendant Investors Funding Corporation ("IFC").[1] During 1972 and 1973, the financing arrangement between Sutton and IFC was used by the principals of IFC, defendants Dansker, Haymes, and Orenstein (the "IFC defendants"), to divert approximately $5,000,000 in IFC funds to their personal use.

Although much of the property acquired by Sutton and IFC was zoned non-commercial, they ultimately decided to build a huge shopping center complex on it. To this end, Sutton petitioned the Fort Lee Board of Adjustment in late 1973 for zoning variances permitting the construction of the project. Plans for the complex were announced publicly in early 1974.

A large segment of Fort Lee's populace reacted strongly to the proposal. One of the leaders of this opposition was the defendant, Nathan Serota, the vice-chairman of the Fort Lee Parking Authority. Serota was a builder on Long Island but resided in an expensive condominium apartment located in Fort Lee near the proposed project complex. Although he took no action in his capacity as a public official, Serota paid for advertisements in local newspapers opposing the project and helped form a citi-

1. Since IFC could only act through its officers and agents, its criminal responsibility in this matter is predicated solely upon the alleged misconduct of its principals, Dansker, Haymes, and Orenstein.

Hence, a reversal of the convictions of the IFC defendants would inure to the benefit of the corporation. *E.g., United States v. American Radiator & Stand. San. Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970).

zens group which brought lawsuits against the developers. In addition, he organized and financed a slate of candidates for the Borough Council who made the proposed complex the major issue in the upcoming elections. However, Serota and the project's opponents concentrated their immediate efforts on blocking approval of the developers' petition for variances then pending before the local Board of Adjustment.

Public hearings on Sutton's petition began before the Board of Adjustment in early March 1974. From the outset, Serota, accompanied by counsel, regularly attended the hearings and took an active part in them. By April, it became evident that the project had little chance of gaining the needed variances.

At this point defendant, Andrew Valentine, president of the defendant, Valentine Electric Company,[2] approached Sutton and offered to assist in obtaining official approval for the project in exchange for an opportunity to receive the electrical contract for the complex. At a subsequent meeting between them, Valentine suggested that their problems could be solved by buying off the two major opponents of the project, Serota and Mayor Ross. Sutton then relayed this proposal to the IFC defendants who approved such an approach and agreed to finance it.

In the weeks that followed, Serota was contacted by Valentine. They worked out an agreement under which Serota would sell his Fort Lee apartment, valued at $500,000, to the developers for $900,000. In addition, Serota would agree to cease his opposition to the project and take active steps to secure its approval in a modified form. Serota was to also receive an additional $200,000 in cash on the date his apartment was sold.

The actual sale of Serota's apartment was consummated on May 15. Under the terms of the contract, Serota

2. Valentine Electric Company's criminal responsibility in this matter is also predicated upon the alleged misconduct of its principals, the defendants Valentine and Diaco. Consequently, a reversal of the convictions of those defendants would inure to its benefit.

sold his apartment for $900,000 ($250,000 down, $650,00 in deferred payments) to Herman Lasker, defendant Orenstein's brother-in-law, as agent for an undisclosed principal. The purchaser agreed to sublease the apartment back to Serota rent-free until September 30, 1978. The contract also contained a provision stating that Serota agreed to halt his opposition to the project. However, no mention at all was made of Serota's agreement to assist in obtaining official approval for the project or the additional $200,000 in cash he received on the closing date.

Having "taken care" of Serota, the defendants turned their attention to Mayor Ross. On May 19, a meeting took place between Ross and the defendant Joseph Diaco, a principal of Valentine Electric, at which Diaco sought to have Ross postpone the Board of Adjustment's decision on Sutton's petition which was then scheduled for May 22. When Ross indicated that he could not, Diaco asked him, "Would money help?". The meeting closed with Ross' agreement to meet with the developers' attorneys, but only after the Board of Adjustment rendered its decision. Ross secretly reported the incident to the United States Attorney's Office the following day, and thereafter worked with it in its investigation of the matter.

On May 22, Ross met with Diaco once again and had several telephone conversations with him. Diaco continually urged him to delay the Board's decision scheduled for that evening. This time, however, he offered him first $200,000, then $400,000, and finally $500,000 for his cooperation. During the last phone conversation of the day, which was taped, Diaco repeated his $500,000 bribery offer and threatened to expose "something about [Ross'] administration" if he refused to go along. Ross, however, would only agree to meet with the defendants' attorneys after the variances had been turned down.

As expected, without Ross' intervention the Board voted down Sutton's petition. An outright rejection carried with it dire financial consequences for IFC which was

then heavily indebted to several New York banks. Consequently, in order to placate IFC's creditors, Sutton and the IFC defendants decided to submit a modified version of the project to the Board in the near future. It was imperative that this modified proposal quickly receive official sanction. To this end, Valentine was again enlisted to attempt to secure Ross' assistance.

On May 24, Ross, wearing a body recorder provided by the FBI, met with Diaco in a Hackensack, N.J restaurant. They discussed the means by which approval of the project in its revised form could be obtained. For his assistance, Ross was offered $100,000 as an advance to evidence Diaco's good faith, with an additional $200,000 to $400,000 to be forthcoming. Ross feigned acceptance of the proposal and agreed to meet further with Diaco and Sutton.

Ross' meeting with Diaco and Sutton took place on May 26 in a Paramus, N.J. diner. Ross was again equipped with a body recorder. The three discussed in detail the modified version of the project. Sutton stated that approval of it was needed by June 17. They then turned to the subject of the bribe. Ross indicated that he did not believe that $100,000 was overly generous. However, he accepted $100,000 in cash from Diaco. Later that day, he delivered this money to the FBI.

By May 29, IFC was under heavy pressure from the New York banks holding its notes. In order to avoid financial disaster a definite date on which the modified proposal would be placed on the Board's agenda was needed. Consequently, the IFC defendants contacted Sutton and urged him to finalize arrangements.

The following day, Ross, Sutton, and Diaco met once again. The three agreed that the revised plan would be submitted to the Board on June 7. It was hoped that official approval could then be obtained within ten days. For his part in the scheme, Ross would receive $200,000 in cash when the Board approved the plan and an additional

$200,000 in monthly installments of $25,000. This proved to be the final clandestine meeting between Ross and any of the defendants for on May 31, the initial indictments in this prosecution were handed down.

Originally, Sutton and Diaco were indicted for conspiracy to bribe Mayor Ross. This first indictment was dismissed with leave of the court after Sutton was permitted to plead guilty to a lesser offense in exchange for his agreement to furnish evidence on behalf of the government. Thereafter, a second indictment was handed down against all the defendants in the instant appeal. This second indictment was superseded by a third which charged the defendants with the identical crimes, but contained additional allegations and corrected arguable defects in the second. The defendants appeal from their convictions under this third indictment.

ISSUES ON APPEAL:

I. *Attack on Count III*

A. Serota's Appeal

Defendant Serota has raised numerous challenges to his conviction under Count III, the principal of which is that his conduct failed to violate the Travel Act, 18 U.S.C. § 1952. The Travel Act makes it a federal offense for an individual to utilize the facilities of interstate commerce with the intent "to further any unlawful activity". It goes on to define "unlawful activity" as the crimes of "extortion, bribery or arson in violation of the laws of the state in which committed or of the United States". Serota was charged with violating this federal statute by accepting a bribe in violation of the laws of New Jersey. He vigorously asserts, however, that the actions charged and proven against him fail to constitute bribery under any definition of the crime.

At the outset we note that the Travel Act incorporates into federal law New Jersey's substantive law of bribery

for this particular case, even though it contains a more expansive definition of the crime than that found at common law. The Travel Act does not reach only those state offenses which would have constituted the crimes of "extortion, bribery, or arson" at common law. Rather, all state offenses which can be generically classified under those headings fall within its purview. *United States v. Nardello,* 393 U.S. 286 (1968).

This broad interpretation of the Act has enabled it to encompass state statutory expansions of the crimes of extortion, bribery and arson over the years, and thus more effectively carry out its purpose of aiding local law enforcement efforts to combat "pernicious undertakings which cross state lines". Hence, in *Nardello,* the Supreme Court held that the defendant's "shakedown" operation could constitute extortion within the meaning of the Travel Act even though a private citizen could not commit the crime of extortion at common law and the particular state involved classified the defendant's activities as blackmail.

As will become evident in our discussion of New Jersey law, the conduct prohibited by the relevant New Jersey bribery statute easily comes within the generic term bribery. Consequently, we will analyze Serota's activities in terms of New Jersey law in determining whether they violated the Travel Act.

In maintaining that his conduct failed to constitute the acceptance of a bribe, Serota raises two main arguments. First, he contends that it was neither charged nor proven that the alleged bribers paid him any monies because of his status as vice-chairman of the Fort Lee Parking Authority. In this regard, he points out that there is no record evidence indicating that the influence he agreed to exert on behalf of the developers derived in any way from his official position or that the alleged bribers believed that he could influence public decisions concerning the project by virtue of his public office. Secondly, he asserts that the government made no effort to establish

that he was to act in a manner other than that permissible for any private citizen in attempting to influence official actions with respect to the project.

The government contends, however, that Serota's arguments are immaterial under its construction of the relevant New Jersey law. That law does not require that a public official agree to be influenced in connection with his official duties. Indeed, the recipient need not be a public official at all. Rather, the government maintains, the crime is made out whenever the recipient agrees to accept payment with the "corrupt intent" to influence any official action whatsoever.

Although arguing that any individual may be guilty of accepting a bribe under New Jersey law, the government asserts that the requisite corrupt intent is much easier to establish when a public official is the recipient. Since a public official is bound by rules of honesty and integrity far more stringent than those imposed on private citizens, it argues that it need only be shown that a public official accepts a personal benefit in exchange for his agreement to influence any official action, whether in a lawful manner or not.

Under its interpretation of the relevant New Jersey law, the government insists that the evidence below is sufficient to sustain Serota's conviction. It is undisputed that Serota was a public official who accepted monies from the developers. The evidence justified a finding that, in exchange for this payment, he agreed not only to halt his opposition to the project, but also to take affirmative steps to secure official approval for it in a modified form. In this latter respect, the record indicates: (a) that Serota agreed to issue a public statement favoring the modified project's construction; (b) that he changed his stance at the Board of Adjustment's hearings from one opposing the project to one supporting it in a reduced format; (c) that shortly after the sale of his apartment, he told Valentine, "We can take care of the hearings. We'll cooperate with

you''; and (d) that he agreed to speak to his slate of candidates in order to induce them to support a limited project and, if ultimately elected, to assist in obtaining official approval for it. The government concludes that an agreement by a public official to influence governmental action in this manner in exchange for money establishes his ''corrupt intent'' and thus violates New Jersey's law of bribery.

The pertinent New Jersey statute provides as follows:

N.J.S.A. 2A:93-6

> Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state of any county, municipality or other political subdivision thereof, or of any public authority, is guilty of a misdemeanor.

Certainly, on its face, it would appear to encompass Serota's conduct. It does not require that the recipient of a bribe be a public official, or if a public official, that he agree to be influenced with respect to his official duties. Nor does it require that the recipient somehow attempt to influence governmental action in an unlawful or otherwise corrupt manner. Rather, the statute, by its terms, makes it unlawful for any individual to accept any benefit in exchange for his agreement to influence any official action in any manner.

Obviously, the statute cannot be read in such a literal fashion without running afoul of the first amendment. The government implicitly concedes this point by attempting to engraft a ''corrupt intent'' element onto it. Consequently, we must resort to the relevant New Jersey case law in order to obtain the proper construction of the statute.

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Our analysis of the most recent New Jersey cases construing the statute indicates that it was designed to reach only that conduct which has been the traditional concern of the law of bribery—conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action. The only expansion of the common law crime seemingly effected by the statute is that any individual may be convicted of accepting a bribe if he in fact possesses, or creates the appearance that he possesses, the ability to influence official conduct. In expanding the law's ambit to include both actual and would-be brokers of governmental corruption, the New Jersey legislature apparently intended to deter all individuals willing to purchase such governmental influence, and thus better insulate public actions from corruption. *See State v. Ferro*, 320 A.2d 177 (App. Div.), *cert. denied*, 65 N.J. 566 (1974). However, whether the recipient is a public official or a private citizen, the gravamen of the offense remains the same. The recipient must agree to utilize whatever apparent influence he might possess to somehow corrupt a public office or an official act.

A close examination of both cases relied on by the government for its broad interpretation of the statute supports our more narrow construction. In *State v. Sherwin*, 317 A.2d 414 (App. Div.), *cert. denied*, 65 N.J. 569, *cert. dismissed*, 419 U.S. 801 (1974), the defendant, New Jersey's Secretary of State, was convicted of accepting a bribe under the statute in question. He had urged the state's Commissioner of Transportation to reject the low bid on a highway contract in favor of that submitted by a contractor who had enlisted his aid by contributing $10,000 to his political party. On appeal, the defendant argued, among other things, that he could not be found to have violated the statute without a showing that he possessed the official authority to effect the governmental action sought.

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In affirming his conviction, the court found it immaterial that he lacked such official authority. However, the court did not base its decision on the mere fact that the defendant was a public official as the government seems to suggest. Rather, the court found that the defendant had violated the statute because he had used the "opportunity to perform a public duty as means of acquiring an unlawful benefit". 317 A.2d at 422. Obviously, the "public duty" referred to was that of the Department of Transportation, since the defendant possessed none with respect to the highway contract involved. Hence, liability was predicated on the fact that the defendant, in exchange for favors, had agreed to utilize whatever apparent influence [3] he might possess to undermine the integrity of the decision-making processes of that governmental body.

That the essence of the offense remains an agreement to corrupt a public office or action is even more evident in *State v. Ferro, supra.* There, the defendant was the local leader of the Democratic Party but held no public office. He was convicted of accepting a bribe upon a showing that he had accepted money from two defendants in pending state criminal prosecution in exchange for his agreement to use his influence in order to secure for them favorable treatment from the local probation office and state courts. In affirming his conviction, the court rejected his argument that N.J.S.A. 2A:93-6 did not reach the activities of private citizens. Rather, the court found that the statute was aimed at both actual and would-be brokers of governmental corruption, and that, as a result, any individual could be guilty of accepting a bribe so long as he created an understanding with the briber that "he [could] influence matters in connection with an official duty." 320 A.2d at 179. As the court went on to state:

"The most reasonable interpretation of this provision is that it was designed to broaden the offense of

3. Moreover, that he possessed influence in this matter is evident from the fact that the Commissioner initially acceded to his request and rejected the low bid. 317 A.2d at 417-18.

bribery so as to include the peddling of influence by a person in an apparent position of access to a public official. Such activity is not penalized by the common law. *Yet, being a common evil which denigrates the integrity of our public institutions, the Legislature undoubtedly intended to proscribe such conduct.*" (emphasis added). 320 A.2d at 180.

Our construction of the pertinent New Jersey bribery statute, then, differs greatly from that pressed upon us by the government. The statute does not make criminal an agreement by a public official to influence, in an otherwise lawful manner, governmental action unrelated to his office because, in entering such an agreement, he violates some nebulous standard of propriety imposed on public officials by law. Rather, in order to establish a violation of the statute, it must be demonstrated: (a) that the alleged recipient, whether he be a public official or not, possessed at least the apparent ability to influence the particular public action involved; and (b) that he agreed to exert that influence in a manner which would undermine the integrity of that public action.

In view of the government's erroneous interpretation of the relevant law, it is not surprising that the evidence adduced below, even when viewed in the light most favorable to the government, is insufficient to sustain a conviction under the statute, properly construed. With respect to the first factor noted above, although it is clear that Serota was a public official, the government failed to produce any evidence whatsoever indicating that he had any ability, actual or apparent, to influence official decisions concerning the project in his official capacity, or that the alleged bribers believed he could do so by virtue of his public office. Indeed, on the record before us, it is not even clear that the developers were aware of the fact that Serota was the vice-chairman of the Fort Lee Parking Authority. Hence, on the facts of this case Serota's status as a public official, a factor crucial to the government's theory of

criminality,[4] really has no bearing on the issue of whether Serota's activities violated the particular statute involved.

Moreover, an examination of the record fails to disclose any evidence suggesting that Serota had any access to the Board of Adjustment in some unofficial capacity which the developers were interested in purchasing. Rather, the only influence, discernible from the record, which Serota possessed in these matters was that derived from his activities as a private citizen vocally opposing the project's development. And, a fair reading of the record indicates that it was in this capacity as "the leader of the . . . biggest portion of the opposition" that he was approached by the developers.

Turning to the second prong of our analysis, we agree that the evidence introduced by the government conclusively establishes that Serota agreed to halt his previous opposition to the project and publicly exert his considerable influence in the developers' behalf. However, even though the evidence demonstrates that he agreed to take "affirmative" steps to secure official approval for the project in a modified form, without more, it fails to justify a finding that, in so doing, he was to engage in any conduct that would corrupt the activities of the Board of Adjustment. Certainly, his public reversal of his prior stance against the project, even if motivated by financial considerations, could not subvert the integrity of that governmental body. Nor would his efforts to induce his slate of candidates to endorse a limited project since they obviously possessed no authority whatsoever in these matters prior to their election.

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4. Indeed, the government seemed to rely entirely on this factor as evidenced by the prosecutor's following statement:

> "He [counsel for Serota] suggests, for example, if Mr. Serota had been another member of the Fort Lee Aroused Citizens and had not been vice chairman of the Parking Commission of Fort Lee perhaps no crime would have been committed and perhaps he is right, but the star[k] fact here is that Mr. Serota is in fact a public official. As such, the law imposes upon him obligations that it does not impose on private citizens."

The only remaining piece of evidence relied on by the government—Serota's statement to the effect that he would "take care" of the hearings by cooperating with the developers—fails to raise an inference of criminality when viewed in the context of the entire record. As previously noted, there was no record evidence suggesting that Serota could influence the Board of Adjustment in any manner other than by ceasing his opposition to the project and publicly supporting its construction. Hence, against this background, Serota's statement can only be reasonably interpreted as his agreement to take a stance in favor of the project before the Board. *See United States v. Cades*, 495 F.2d 1166, 1169-70 (3d Cir. 1974); *United States v. Finnerty*, 470 F.2d 78, 81 (3d Cir. 1972). Moreover, even if this single statement could support some inference of illegality, we would find it insufficient to justify Serota's conviction, especially in view of the government's burden of proof and the possible infringement of Serota's first amendment rights to freedom of speech.

We therefore find that the evidence below establishes nothing more than Serota's agreement, in exchange for money, to withhold his prior opposition to the project and publicly advocate its construction in a reduced form. While Serota's motives in entering an agreement of this nature are hardly commendable, there is no suggestion that he agreed to corruptly influence the Board of Adjustment. Accordingly, we hold that the government failed to prove that Serota violated the statute in question. His conviction under Count III will therefore be reversed.

B. *Appeal of the Remaining Defendants*

What we have said concerning the sufficiency of the evidence under Count III with respect to Serota also holds true for his alleged bribers, the remaining defendants in this case. In order for that evidence to sustain their convictions for bribing Serota, it must demonstrate, at a mini-

mum, that, in purchasing his support, they intended to corrupt the decision-making processes of the Board of Adjustment, the governmental entity he was to influence. Evidence of this nature, however, is totally absent on the record before us. Rather, the evidence, taken in its entirety, establishes only their intent to silence Serota's vocal opposition and enlist his public support through their payments to him. Reprehensible as this may be, it simply fails to violate New Jersey's law of bribery. Consequently, their convictions under Count III must also be reversed.

II. *Issues Raised Jointly by the Defendants Under Counts I and II:*

Before turning to the alleged errors of the trial court, we will first consider the defendants' contention that their convictions under Counts I and II must also be reversed, if, as we have already determined, the evidence under Count III was insufficient to support their convictions for bribing Serota.

With respect to Count I, the defendants argue that in view of our decision on Count III, it is no longer possible to determine whether they were convicted of a conspiracy properly charged and proven. Count I alleged that the defendants had conspired to bribe Ross and Serota. The district court, however, instructed the jury that if it found that the alleged conspiracy had as its illegal objective *either* the bribe of Ross or Serota it could convict the defendants. The conspiracy count was thus submitted to the jury on alternative theories, only one of which, in retrospect, was sufficient to justify a conviction. The jury then rendered a general verdict of guilty on Count I making it impossible to identify the grounds on which its decision was based. Consequently, the defendants assert that their convictions may have rested solely on a finding that they had conspired to bribe Serota and must, therefore, be reversed.

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In response, the government maintains that any lingering doubts as to the basis of the jury's verdict on Count I are dispelled by its decision on Count II. Since the jury there found the defendants guilty of jointly bribing Mayor Ross, the government insists that it must have also determined that the Ross bribe was at least one of the conspiracy's objectives. The government therefore concludes that the validity of the conspiracy convictions are in no wise jeopardized by our decision with respect to Count III.

We cannot agree. The government's position ignores the fact that the crime of conspiracy is separate and distinct from the related substantive offense. It requires proof of the additional element of an agreement between the alleged co-conspirators. *Pinkerton v. United States*, 328 U.S. 640 (1946); *United States v. Pappas*, 445 F.2d 1194 (3d Cir. 1971). Hence, it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the defendants of the substantive offenses charged.

In the instant case, the possibility thus remains, albeit slim, that the jury found that the defendants engaged in a conspiracy to bribe Serota alone in spite of its guilty verdict on Count II. As a result, the defendants' conspiracy convictions must be vacated and this case remanded to the district court for a new trial unless it determines that Count I, in its present form, is fatally defective in light of the conclusions reached herein.

As to their convictions under Count II for bribing Mayor Ross, the defendants argue that the improper submission to the jury of Count III and the evidence relating thereto so infected their convictions that a new trial is warranted. In this regard, the defendants do not suggest that the evidence below was insufficient without that of the Serota bribe to support the jury's verdict on Count II. Rather, they contend that they were unduly and improperly prejudiced on Count II by the jury's consideration of the purported Serota bribe and its finding of guilt thereon.

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Although the district court did err in submitting Count III to the jury, we do not believe that its error so tainted the jury's deliberations on Count II that a reversal of the defendants' convictions for bribing Mayor Ross is in order. The evidence concerning the two bribes was of such a nature that it could be easily compartmentalized by the jury and then considered independently by it under each separate count of the indictment. For example, the two bribes were entirely different in form. Serota received the bulk of his payments under the guise of a contract of sale for his apartment. Ross, on the other hand, was surreptitiously paid by the defendants. Moreover, the two bribes were separated in time. Ross was not even contacted by the defendants until after Serota's assistance had been secured. Consequently, we believe that there was little possibility that the jury relied on improper evidence in reaching its guilty verdict on Count II.

In any event, nearly all of the evidence concerning the defendants' dealings with Serota would have been admissible even if Count III had not been included in the indictment. The Serota transaction was an integral part of the defendants' scheme to obtain the variances needed for their project. Hence, evidence concerning it was clearly relevant to show the defendants' motive in approaching Ross with their proposition as well as their modus operandi. Any prejudice suffered by the defendants from the balance of this evidence was minimal and certainly does not entitle them to a new trial.

In the remainder of our opinion we will determine whether their convictions under Count II of the indictment can stand in light of their further assignments of error.

A. *Recusal*

Prior to trial, the defendants Diaco, Valentine, and Valentine Electric filed timely motions pursuant to 28 U.S.C. § 144 seeking to have the district judge disqualify himself on the ground that he was personally biased against

them.[5] Each such motion was accompanied by the required affidavit of bias from the movant as well as a certificate of good faith from his counsel of record. The trial judge, however, refused to recuse himself holding that the allegations contained in the affidavits were not sufficient to establish the requisite personal bias on his part. On appeal, the defendants contend that he erred in so doing.[6]

The affidavits of bias submitted by Diaco and Valentine may be summarized. Diaco and Valentine are identified as principals of Valentine Electric since its formation in 1958. The affidavits then go on to allege that between 1969-71 the trial judge, while serving as United States Attorney for the District of New Jersey, repeatedly and publicly singled out Valentine Electric as having underworld connections; that he invited competitors of Valentine Electric to bring any complaints against it to the

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5. Three months after the initial indictment in this prosecution was handed down, Diaco moved for the district judge's recusal. At the hearing on this motion, questions arose as to the timeliness of Diaco's motion and the good faith of his attorney's certificate. As a result of this latter issue, Diaco's attorney stipulated to additional facts not contained in his client's affidavit of bias. Thereafter, while indicating that the motion was not timely and subject to dismissal on that ground, the district judge denied the motion as being legally insufficient.

When the first indictment was later dismissed and superseded by the second, Diaco once again moved for the trial judge's disqualification on the basis of a new affidavit which contained the additional allegations previously omitted, but stipulated to by his counsel. Valentine and Valentine Electric also moved for recusal at this time and filed an affidavit essentially adopting all the allegations contained in that of Diaco. These motions were then denied as being legally insufficient.

After the third indictment, under which defendants were ultimately convicted, was returned, Diaco again moved for recusal on the basis of the papers previously filed by him. Although Valentine and Valentine Electric failed to file a formal motion in this regard, the trial judge treated their earlier motion as having been renewed, and then denied all the motions seeking his disqualification.

In the instant appeal, then, we need only consider the legal sufficiency of the affidavits before the trial judge when he denied the motions for his recusal under the third indictment. Any claims as to the propriety of his actions at the hearing on the first motion for recusal have been rendered moot by the subsequent dismissal of the first and second indictments.

6. The defendants other than Diaco, Valentine and Valentine Electric also assert that the district judge's refusal to recuse himself constitutes reversible error as to them even though they refused to join in such motions below. Their assertion does not constitute compliance with the statute. See 28 U.S.C. § 144.

attention of his office; and that he conducted vigorous investigations of the company's affairs. These investigations were highlighted by his office's 1970 prosecution of, among others, Anthony Boiardo, then owner of one third of Valentine Electric's stock and widely reputed to be an underworld figure, and Joseph Biancone, a Valentine employee, for acts of extortion both on and off the premises of the company. In addition, Diaco alleged that he himself had been called before a federal grand jury on two separate occasions and questioned about his relationship with Boiardo and the manner in which Valentine Electric obtained its contracts.

Both Diaco and Valentine, however, make a number of significant concessions in their affidavits. They concede that the district judge's statements were primarily directed against Boiardo who was generally regarded as the controlling figure in Valentine Electric and that Boiardo severed all connections with the company in 1970. Moreover, they admit that after Boiardo disassociated himself from the company and while the trial judge was still United States Attorney, a representative of his office informally advised a law firm, which was considering Valentine Electric as a potential client, that there was no longer any basis for believing that its principals were engaged in criminal activity.

The affiants insist, however, that these latter allegations demonstrate only a lack of criminal evidence, rather than a lack of prejudice against them. Hence, based on their allegations in their entirety, they conclude that the court was personally biased against Valentine Electric and against them because of their intimate connection with that company.

The basic rules of law governing the recusal of a trial judge for personal bias are well-settled. The mere filing of an affidavit of bias pursuant to 28 U.S.C. § 144 does not require a trial judge to disqualify himself from a particular case. *Behr v. Mine Safety Appliances Co.*, 233 F.2d

371 (3d Cir. 1956). Indeed, if the affidavit submitted is legally insufficient to compel his disqualification, the judge has a duty to preside. *See Simmons v. United States,* 302 F.2d 71 (3d Cir. 1962). Rather, a trial judge need only recuse himself if he determines that the facts alleged in the affidavit, taken as true, are such that they would convince a reasonable man that he harbored a personal, as opposed to a judicial, bias against the movant. *United States v. Thompson,* 483 F.2d 527 (3d Cir. 1973).

After analyzing the defendants' affidavits under this standard, we are unable to say that the trial judge erred in refusing to disqualify himself. Neither Valentine nor Diaco make a single allegation indicating that the district judge ever manifested, by word or deed, any hostility, animosity, or, for that matter, any emotion whatsoever towards them personally. Rather, Diaco and Valentine base their belief that the district court could not preside at their trial in a fair and impartial manner entirely on his prior investigation of, and statements concerning, Valentine Electric and his prosecution of Boiardo and Biancone. However, allegations that the trial judge, during the course of his duties as United States Attorney, investigated, commented upon, and prosecuted some of the former principals of a company with which the defendants are connected do not, without more, establish that he was personally biased toward them as required by the statute. If anything, allegations of this nature merely evidence "an *impersonal* prejudice, [going] to the judge's background and associations *rather than his appraisal of the* [*movants*] *personally.*" *Parker Precision Products Co. v. Metropolitan Life Insurance Co.,* 407 F.2d 1070, 1077-78 (3d Cir. 1969) (emphasis added).

The status of Valentine Electric raises a somewhat more difficult problem in light of the fact that the district judge both investigated it and made derogatory comments concerning it while serving as United States Attorney. However, while it is certainly conceivable that an indi-

vidual may be prejudiced against a corporation such as General Motors which has attained an identity that transcends the personalities of those involved in its management, we do not read the affidavits before us to suggest that the trial judge harbored any such bias towards Valentine Electric in the abstract. Rather, we think that his alleged words and deeds evidence nothing more than hostility toward Anthony Boiardo, the individual then reputed to be in control of the company. Indeed, the affiants themselves seem to acknowledge this when they state that they:

> "under[stood] that those statements were directed basically toward Mr. Boiardo who stood in the public eye according to [the trial judge] as the one who had infiltrated and controlled Valentine Electric."

The affidavits further allege, however, that Boiardo severed all connections with Valentine Electric in 1970, and that, thereafter, the United States Attorney's Office, under the trial judge's direction, advised a law firm that there was no longer any reason to believe that the company was engaged in criminal activity. Consequently, we believe that the affidavits do not establish a more substantial basis for recusal with respect to Valentine Electric, than they do for either Diaco or Valentine, its principals and sole remaining stockholders.

We therefore hold that the affidavits submitted by the defendants under § 144 fail to allege the requisite personal bias on the part of the trial judge, and that he committed no error in presiding at their trial. In reaching this conclusion, we emphasize that we have confined our analysis to the legal sufficiency of the defendants' affidavits of bias under § 144.

B. *Jury Selection:*

The defendants next challenge the procedures utilized by the district court in selecting the jury. Prior to trial,

the defendants filed motions seeking a change of venue or vicinage, severance, and a dismissal of the indictment because of the extensive and allegedly prejudicial publicity given their case in the Newark, New Jersey area. Rather than moving the trial from Newark, the district court, pointing to an apparent absence of such publicity in the Trenton, New Jersey area, decided to select the jury from that vicinage, and, thereafter, sequester it during the trial in Newark. The court itself conducted the *voir dire* of the veniremen. In addition, in order to expedite the selection process so that the advantages secured by selecting the jury in Trenton would not be lost, it questioned the potential jurors, for the most part, as a group. Proceeding in this manner, the court succeeded in empaneling a jury in a single day.

While acknowledging that Rule 24, Fed. R. Crim. Proc., grants the district court considerable leeway as to the manner in which it conducts *voir dire*, the defendants contend that the selection procedure here adopted by the court was unfair. More specifically, they claim that the district court abused its discretion by (1) failing to examine each prospective juror individually as to his or her exposure to prejudicial pre-trial publicity; and (2) failing to explore adequately potential areas of juror bias to which the defendants had directed its attention. It should be noted, however, that the defendants do not contest the final composition of the jury selected.

On the issue of pre-trial publicity, the defendants argue that where, as here, extensive pre-trial publicity has been given a case, our decision in *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1972), requires a district court to examine each prospective juror individually and outside the presence of the entire panel on the question of his or her exposure to such publicity. They contend that the district court's failure to conduct such an individualized examination under the circumstances of the instant case constitutes reversible error.

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We disagree. In *Addonizio*, we recommended that a district court follow such a procedure only when, in its opinion, there existed a "significant possibility" that individual talesmen would be ineligible to serve because of their exposure to potentially prejudicial pre-trial publicity. Only by such an individualized examination, we reasoned, could the effects of such exposure on the juror's attitudes toward the impending trial be determined. However, even though the district court failed to follow our recommendations below, it did take measures to screen-out potential jurors who had been exposed to such publicity. Under the facts present here, those measures proved more than adequate to protect the defendants' interests in obtaining a jury unswayed by the publicity surrounding the case.

In the first place, the court wisely decided to select the jury from an area where pre-trial publicity concerning the case had been minimal. This alone significantly lessened the possibility that any of the prospective jurors would have had any pre-conceived notions about the trial.

Secondly, and more importantly, the defendants were in no way prejudiced by the end-result of the selection procedures utilized by the district court. At the outset of *voir dire*, the court asked the entire panel of 217 jurors whether any of them had read or heard anything about the case. Eighteen jurors responded affirmatively. These eighteen were then asked whether, as a result of what they had read or heard, they had formed an opinion as to the guilt or innocence of any of the defendants. Twelve of the eighteen indicated that they had done so and were excused *sua sponte* by the court. The remaining six were then examined by the court as to their exposure to pre-trial publicity and they indicated that, despite such exposure, they could try the case in a fair and impartial manner.

Following the examination of the entire panel, groups of twenty-four prospective jurors were seated in the jury box and questioned by the court. The court once again asked each group whether any of its members had read or

heard anything concerning the case. No jurors responded affirmatively other than the unexcused jurors who had previously done so. Of those six jurors, four were eventually excused for other reasons[7] and the remaining two were not seated. Hence, the court succeeded in empaneling a jury composed of individuals who had previously read or heard nothing about the case.

Under these circumstances, the defendants have little cause to complain over the district court's failure to conduct the individualized examination we recommended in *Addonizio*. That procedure is designed to enable both court and counsel to discern whether a venireman's prior exposure to publicity concerning the case would preclude him from sitting as a fair and impartial juror. However, here, every juror who indicated any exposure whatsoever was eventually excluded from the panel. This factor alone distinguishes this case from *Addonizio* where nine of the twelve jurors empaneled had read or heard something about the case prior to trial. Since none of the jurors selected below had been subjected to any publicity concerning the case, the defendants were not exposed to the particular danger the *Addonizio* procedure is designed to guard against.

We therefore find no error in the district court's failure to conduct an individualized examination of prospective jurors as to their exposure to pre-trial publicity. Moreover, even if we were to find error, under the circumstances existing here, it would certainly be harmless and in no way entitle defendants to a new trial.

We turn next to the district court's alleged failure to explore adequately potential areas of juror bias. The defendants essentially make two arguments in this regard. First, they cite as error the district court's refusal to ask the prospective jurors all questions submitted by them directed at exposing such bias. Second, they assert that

7. It should be noted that these jurors were excused without the exercise of peremptory challenges by the defendants.

the prospective jurors should have been examined individually as to potential bias on their part. We will consider these arguments in order.

Prior to the selection of the jury, the defendants jointly submitted proposed questions aimed at discovering a juror's attitudes in three areas, which, they claim, had a direct bearing on the merits of the case. Those areas were the wealth of the defendants, politicians and money, and the fact that Serota had, in a sense, "sold out" those opposing the project's construction. The defendants maintain that the district court's refusal to ask these questions, or anything similar to them, made it impossible to discover whether such prejudices existed, and if so, to excise them from the trial.

At the outset we note that the latter two areas of potential bias primarily concern Serota and the defendants concede as much in their briefs. Consequently, the remaining defendants have little cause to complain about the district court's alleged failure to ask questions directed at those areas.

We need not, however, rely on this factor in reaching our decision. As already noted, Rule 24 F. R. Crim. Proc., grants the district court broad discretion as to the manner in which it conducts *voir dire,* subject only to the essential demands of fairness. This discretion certainly includes the decision as to what questions should be asked when the court itself decides to examine the prospective jurors so long as inquiries relevant to the discovery of actual bias are not omitted. *See United States v. Wooton,* 518 F.2d 943 (3d Cir. 1975). Consequently, although Rule 24 does allow counsel to submit proposed questions to the court, it does not assure him that those questions will be asked.

Our examination of both the questions asked the panel and the instructions given it indicates that, despite defendants' argument to the contrary, the district court did cover, in substance, all the areas which the defendants wished to explore. Hence, this is not a case where the court entirely

omitted inquiries relevant to the discovery of actual bias. *See United States v. Napoleone*, 349 F.2d 350 (3d Cir. 1965). Moreover, in some instances, the questions and instructions of the court were even more specific, and, as a result, more probing, than those requested by the defendants. Under these circumstances, we find no abuse of discretion in the district court's failure to pose to the jury all proposed questions submitted by the defendants.

Whether or not the district court erred in refusing to conduct an individual *voir dire* as to potential juror prejudice raises a somewhat more serious problem. For obvious reasons, an individualized examination is the most effective manner by which to discover latent prejudices on the part of a particular juror. Indeed, under certain circumstances, it may be the only means of assuring a defendant his right to an impartial jury.

At the same time, however, it is an extremely time consuming process which, when unnecessary, must be foregone in the interests of judicial economy. It is for just such reasons that Rule 24 grants the district courts such wide latitude in these matters. It leaves to their sound discretion the duty to forge a reasonable accommodation between the interests in obtaining an unbiased jury, and in doing so as expeditiously as possible. *Judicial Conference Committee On The Operation of the Jury System, The Jury System In The Federal Courts*, 26 F.R.D. 409, 465-66.

On the record before us, we are unable to say that the balance struck by the district court constituted an abuse of that discretion. In the instant case, the need to empanel the jury as quickly as possible was particularly acute. Apart from the normal considerations of judicial economy, an expeditious selection also served the defendants' interests in obtaining an unbiased jury. Prejudicial pre-trial publicity had already forced the court to select the jury from the Trenton, rather than the Newark, area. A long, drawn-out *voir dire* would have allowed potential jurors to be subjected to the inevitable publicity in the

Trenton area engendered by the selection there, and thus defeated the purpose of the move. Hence, an expeditious selection was the best available method of insulating prospective jurors from exposure to such publicity.

Nor can we say that the procedure followed by the district court unduly restricted *voir dire* so as to deny the defendants their right to an impartial jury. None of the potential areas of bias cited by the defendants were so serious or pervasive that anything short of an individual *voir dire* would have failed to ferret them out. *Cf., United States v. Stark,* 515 F.2d 112 (3d Cir. 1975). In sum, we are convinced upon a review of the record that the *voir dire* was effective in obtaining an unbiased jury. We therefore find no error in the district court's refusal to conduct an individual *voir dire* as to potential juror bias.

C. *Evidence of Prior Crimes:*

Both prior to and at the trial itself, the defendants vigorously opposed the introduction into evidence of testimony by the unindicted co-conspirator Sutton concerning the previous embezzlement of IFC funds by Dansker, Haymes, and Orenstein, the IFC defendants, on the grounds that it constituted inadmissible evidence of prior crimes.[8] The district court overruled these objections and permitted Sutton to testify on these matters. However, it instructed the jury that this evidence was only to be considered against the IFC defendants and for the limited purpose of determining what, if any, relationship existed between them and Sutton.[9] On appeal, the defendants renew their objections to the admission of this evidence contending (a) that it was irrelevant for any purpose other than to establish a propensity to commit crimes on the part

8. Although this evidence primarily affected the IFC defendants, the non-IFC defendants also challenge its admissibility on the ground that they were unduly prejudiced by its introduction.

9. In its oral opinion permitting the introduction of this evidence, the district court also found it relevant to establish a *modus operandi* and a motive on the part of the IFC defendants.

of the IFC defendants; and (b) that even if relevant for some legitimate purpose, its probative value was far outweighed by its prejudicial impact.

In substance, Sutton testified that the IFC defendants had utilized the financing agreement which required IFC to provide him with the funds needed to purchase properties for the Fort Lee project to divert more than $5,000,000 in IFC funds to their own use. Allegedly, the scheme proceeded in the following manner. Sutton would advance monies from time to time to the IFC defendants for their personal use. At the next property closing for the project, the acquisition cost would be inflated to reflect the monies previously turned over to the IFC defendants. IFC would then pay Sutton this inflated figure. In this manner, the IFC defendants succeeded in concealing their diversion of corporate funds under the guise of capital expenditures for the project.

In this Circuit, the law concerning evidence of prior crimes is well-established.[10] As we stated in *United States v. Stirone*, 262 F.2d 571 (3d Cir. 1958); *rev'd on other grounds*, 361 U.S. 212 (1960):

> "Evidence of other offenses may be received if relevant for any purpose other than to show a mere propensity or disposition on the part of a defendant to commit a crime."
>
> 262 F.2d at 576

Of course, even when such evidence is otherwise admissible under this standard, the district court may, in an exercise of its sound discretion, exclude it if it determines that "the probative value of such evidence is substantially outweighed by the risk that its admission will create a substantial danger of undue prejudice." 262 F.2d at 576-77.

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10. At the time of the proceedings below, the new Federal Rules of Evidence were not yet in effect. However, we note that new Rule 404(b), dealing with evidence of prior crimes, is substantially the same as that previously applied in this Circuit.

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After analyzing Sutton's challenged testimony under the applicable rules of law, we find no error in the district court's admission of it into evidence. Although his testimony indicated prior criminal behavior on the part of the IFC defendants, it was clearly relevant to far more than the defendants' mere propensity to commit crime. In the first place, it cast light, as the district court correctly determined, on the relationship, if any, existing between Sutton and the IFC defendants. Since the government's case against the IFC defendants rested largely on Sutton's testimony, both the existence and the nature of this relationship were of critical importance to Sutton's credibility. In addition, the background information provided by this testimony enabled the jury to better understand Sutton's role in the bribery scheme as well as his testimony as a whole.

Secondly, this testimony helped establish a modus operandi further implicating the IFC defendants in the subsequent bribery scheme. Allegedly, the IFC defendants were to raise the funds necessary for at least the Ross bribe through the same "property closings" that they had previously used to raise money for their own benefit.

Finally, this evidence was relevant to show a motive on the part of the IFC defendants for their alleged attempt to secure the needed zoning variances through bribery. If the IFC defendants had indeed diverted large sums of corporate money to their own use under the pretense of property acquisitions for the project, a large project was essential to justify those expenditures. However, the Fort Lee zoning ordinances posed a formidable obstacle to the construction of that large project. Hence, it is not inconceivable that the IFC defendants would resort to bribery in order to obtain zoning variances permitting the large project needed to cover up their previous unlawful activities.

Nor do we believe that the prejudicial impact of this evidence "substantially out-weighed" its probative value

so as to require its exclusion.[11] To be sure, the possibility always exists that a jury may misuse evidence which is introduced for a limited purpose. However, here, the district court took more than adequate measures to protect against such misuse. Rather than allowing Sutton to detail every transaction by which the IFC defendants had embezzled corporate funds, the court only permitted him to describe the mechanics of their scheme through four illustrative examples. Moreover, at no time was there any suggestion to the jury that these transactions were criminal. Indeed, prior to Sutton's testimony in this regard, the district court emphatically instructed the jury that the indictment did not charge the defendants with committing a crime as a result of these transactions. Finally, the court cautioned the jury time and time again that this evidence could only be considered against the IFC defendants, and against them, for only a limited purpose.

We are therefore convinced that the district court committed no abuse of its considerable discretion in permitting the introduction of this evidence.

III. *Issues Raised By Valentine and Valentine Electric:*

A. *Restrictions Placed on the Cross-Examination of Sutton:*

While conceding, as they must, that there was no complete denial of their right to cross-examine the unindicted co-conspirator Sutton, the defendants Valentine and Valentine Electric contend that this cross-examination was unduly restricted by certain rulings of the district court.

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11. In contesting the admissibility of this evidence, the non-IFC defendants argue that its prejudicial impact necessarily "spilled over" against them. Although we hold that this prejudice, if any, was insufficient to require the exclusion of this evidence, whether it entitled them to a severance from the IFC defendants is a separate issue which we will consider later.

Of the four alleged instances of error,[12] only two merit our discussion: (1) whether the district court abused its discretion in restricting the cross-examination of Sutton as to his previous plea of guilty; and (2) whether the district court erred in refusing to turn over to the defendants statements made by Sutton which were contained in his presentence report.

Prior to trial, Sutton had been permitted to plead guilty to a one count information charging him with conspiracy to violate, among other things, the Travel Act and a section of the Internal Revenue Code, entitled, "Fraud and False Statements, Declarations Under Penalty of Perjury", 26 U.S.C. § 7206(1). The charged conspiracy, insofar as it related to the Travel Act, dealt with the bribes of Ross and Serota. With respect to the second substantive offense mentioned, the charge had its basis in the IFC defendants' prior diversions of corporate funds in that Sutton was accused of aiding them in filing false tax returns which did not reflect those monies. The maximum penalty facing Sutton as a result of his plea to this single count information was a five year term of imprisonment and a $10,000 fine. Of course, had he been charged with and convicted of the various substantive offenses described in the information he could have received a much harsher punishment.

On cross-examination of Sutton, the attorney for Serota[13] sought to introduce the title of the tax statute which Sutton had been convicted of conspiring to violate. His stated purpose in doing so was to establish Sutton's

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12. We find no merit in defendants' argument that the district court unduly restricted their cross-examination of Sutton by refusing (a) to permit the introduction into evidence of certain documents during his cross-examination; and (b) to require the government to disclose the last name of Tony C. and to produce the grand jury testimony of Tony Citrupi, Ruth Golden and Harold Golden pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). To the extent that the defendants other than Serota press his arguments that the district court erred in permitting Sutton to have before him, during cross-examination, documents by which he was being impeached, and in rehabilitating Sutton's testimony during cross-examination, we find them equally devoid of merit.

13. The attorney for Valentine and Valentine Electric indicated his intent to introduce the title of the tax statute if Serota's counsel failed to do so.

knowledge that he had been permitted to plead to a single conspiracy to violate a number of federal statutes when he could have been charged separately with the substantive crimes set out in the information. However, it is also clear that he expected that Sutton's mere plea to a statute bearing that title would reflect adversely on his credibility.

This attempt to introduce the title of the tax statute was vigorously opposed by both the government and the attorney for the IFC defendant Dansker. The government took the position that the introduction of the title alone was misleading since Sutton had not pleaded guilty to filing a false tax return himself, but only to aiding the IFC defendants in doing so. Consequently, it manifested its intent to elicit that fact on redirect if the title to the statute was admitted. Counsel for Dansker, on the other hand, objected to any reference to a crime which might suggest that his client had committed an offense other than that charged in the indictment. Any such reference, he argued, would prejudice his client beyond repair.

Faced with these competing interests among the defendants, the district court refused to permit Serota's counsel to establish the name of the offense. In making this ruling, the court obviously agreed with the government that the title of the statute by itself was misleading under the circumstances and feared the inevitable prejudice to the IFC defendants which would occur if the offense was placed in its proper perspective. However, it did not completely foreclose all inquiry into Sutton's prior guilty plea. The defendants were allowed to establish, if they so desired, Sutton's realization that he could have been charged with far more than a single conspiracy. They were also permitted, and did explore, the fact that Sutton had pleaded guilty to a lesser offense expecting leniency in exchange for his plea and his cooperation with the government. Finally, counsel for Serota was allowed to quote extensively from the information insofar as it pertained to offenses other than the tax violation in an attempt to

demonstrate an inconsistency between Sutton's guilty plea and his testimony at trial.

On appeal, Valentine and Valentine Electric contend that the district court's refusal to permit the introduction of the tax statute's title constitutes reversible error. The mere fact that Sutton had been convicted of a crime of that nature, they argue, had a serious and direct bearing on his credibility. Hence, while acknowledging that the district court's motives may have been "commendable", they assert that its exclusion of any reference to the statute's title frustrated the effectiveness of their cross-examination of a key prosecution witness and thus violated their right to conduct a meaningful cross-examination.

We disagree. The district court has wide discretion in determining the permissible scope of cross-examination. *E.g., United States v. Greenberg,* 419 F.2d 808 (3d Cir. 1969). Although normally the title of a prior crime committed by a witness may be elicited during his cross-examination in order to undermine his credibility, *Beaudine v. United States,* 368 F.2d 417 (5th Cir. 1966), we do not believe that the district court exceeded that discretion on the record before us.

In the first place, the mere fact that Sutton had pleaded guilty to a statute bearing that title would have been of little significance in discrediting his testimony. Any initial adverse impact on his credibility would have been severely diminished when his true role in the offense was subsequently exposed by the government. At the same time, the IFC defendants would have been unavoidably prejudiced when Sutton's offense was placed in its proper perspective. Under these circumstances, we believe that the district court wisely acted to preserve the IFC defendants' interests in obtaining a fair trial.

Moreover, we do not believe that the balance struck by the district court unduly restricted the non-IFC defendants' right to conduct a meaningful cross-examination. The evidence before the jury was more than sufficient for

it to conduct a "discriminating appraisal" of Sutton's credibility. *See United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974). The jury was fully aware of his prior conviction, his expectations of leniency and his previous unlawful activities. In addition, his credibility was repeatedly and severely assailed from every conceivable angle over a cross-examination which covered more than 1,100 pages of a 2,600 page transcript. In this context, we find no error in the district court's decision to exclude a few questions as to the title of a tax statute which were, at best, of limited probative value in discrediting Sutton's testimony. To the extent that any defendant other than Valentine and Valentine Electric seeks to advance this argument we find it equally lacking in merit.

We turn next to the defendants' contentions concerning statements by Sutton contained in his pre-sentence report. During the course of Sutton's cross-examination, counsel for Serota, in a motion joined in by the attorney for Valentine and Valentine Electric, called for the production of any recorded statements Sutton may have made to the probation department as well as the pre-sentence report prepared by it. In making this motion, he relied on both *Brady v. Maryland*, 373 U.S. 83 (1963) and the Jencks Act, 18 U.S.C. § 3500. After obtaining a copy of the report from the probation department and reviewing it *in camera*, the court determined that, although it contained a typewritten statement signed by Sutton, neither it nor the statement were producible under either the Jencks Act or *Brady*. With respect to the Jencks Act the court added that, as a matter of policy, it did not believe that statements contained in pre-sentence reports were within its purview.

In maintaining that the district court erred in refusing to turn over the statement by Sutton contained in his pre-sentence report, the defendants seem to have abandoned the *Brady* argument pressed below. Rather, they appear to rely totally on the Jencks Act in asserting that the statement was subject to production.

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The Jencks Act provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness *in the possession of the United States* which relates to the subject matter as to which the witness has testified." (emphasis added).

In speaking of statements "in the possession of the United States", we understand the statute to require production only of statements possessed by the prosecutorial arm of the federal government. *See Augenblick v. United States*, 377 F.2d 586, 597-98 (Ct. Cl. 1967), *rev'd on other grounds*, 393 U.S. 348 (1969); *United States v. Ehrlichman*, 389 F. Supp. 95 (D. D.C. 1974). Hence, such statements possessed by, for example, the F.B.I. or a United States Attorney must be turned over to the defense on proper motion.

A pre-sentence report and statements contained therein, however, are not within the possession of the prosecution. Indeed, the prosecution has access to them only under limited circumstances, Fed. R. Crim. Proc. 32(c). Rather, a pre-sentence report is a confidential document prepared at the direction of the court solely for its use in imposing sentence. The probation department thus acts as an arm of the court in such preparation. *United States v. Greathouse*, 188 F. Supp. 765 (M.D. Ala., N.D. 1960). We therefore find no error in the district court's refusal to turn over Sutton's statement contained in his pre-sentence report. Of course, to the extent that any defendants other than Valentine and Valentine Electric press this argument the same result applies.

B. *Severance:*

Valentine and Valentine Electric next complain of the district court's failure to grant them a severance below.

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Prior to trial, the district court denied their motion brought pursuant to Rule 14, Fed. R. Crim. Proc., for a severance from IFC and the IFC defendants. They now contend that they were unduly prejudiced during the joint trial which followed by (a) the evidence admitted against the IFC defendants concerning their prior diversion of corporate funds; and (b) the restrictions placed by the court on their cross-examination of Sutton as to his prior guilty plea in order to protect the interests of the IFC defendants. They assert that the district court's failure to grant them a severance at the appearance of such prejudice deprived them of their right to a fair trial.

We find no merit in this argument. A motion for severance is addressed to the sound discretion of the district court. On appeal, the district court's denial of such a motion will not be disturbed absent an affirmative showing that the court's ruling resulted in such prejudice to the moving party that it amounted to an abuse of discretion. *United States v. DeLarosa*, 450 F.2d 1057 (3d Cir. 1971). On the record before us, we see nothing close to the amount of prejudice needed to overturn the district court's decision.

We turn first to their contentions concerning the evidence of the IFC defendants' prior misconduct. In substance, Valentine and Valentine Electric argue that this evidence was so complex and so damning that its prejudicial impact necessarily spilled over against them. Since they would have not been exposed to such prejudice in a separate trial, they assert that the district court erred in failing to grant them a severance.

We cannot agree. A defendant is not entitled to a severance merely because the evidence against a co-defendant is more damaging than that against him. If that were the case, a joint trial could rarely be held. Rather, in determining whether disparate proofs require a severance, the proper inquiry is whether the evidence is such that the jury cannot be expected to "compartmentalize" it and

then consider it for its proper purposes. *United States v. DeLarosa,* 450 F.2d at 1065.

In the instant case, we are convinced that the jury would have experienced little difficulty in "compartmentalizing" the evidence concerning the IFC defendants' prior diversion of corporate funds. Not only did this evidence implicate the IFC defendants alone, it related to a time period prior to the entry of Valentine and Valentine Electric into the bribery scheme. This chronological difference certainly aided the jury in marshalling the evidence admissible against each defendant. Moreover, this evidence concerned activities of the IFC defendants which were far different in kind than anything engaged in by Valentine and Valentine Electric during the bribery plot. Hence, the jury should have had little problem in distinguishing this evidence from that properly admitted against them. Finally, the court emphatically cautioned the jury time and time again that this evidence was only to be considered against the IFC defendants. In the light of these frequent and clear instructions, we can hardly assume that the jury nevertheless considered this evidence against Valentine and Valentine Electric. *See United States v. Barrow,* 363 F.2d 62, 67-68 ((3d Cir. 1966).

Likewise, we do not believe that the restrictions placed on the cross-examination of Sutton so prejudiced Valentine and Valentine Electric that a severance was required. Once again, the defendants' argument in this regard focuses on the district court's frustration of their attempt to establish the title of the tax statute which Sutton had been convicted of conspiring to violate. To be sure, the defendants could have elicited this information in a separate trial. However, in that separate trial, the government would have certainly been permitted to place Sutton's offense in its proper perspective, thus diminishing its prejudicial impact on his credibility. Moreover, as we previously indicated, the defendants were allowed to conduct a more than adequate cross-examination of Sutton.

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Under all the circumstances, we do not believe that the defendants' inability to establish a fact of such limited probative value gave rise to such a degree of prejudice that a severance was mandated.

We therefore hold that the district court committed no abuse of discretion in failing to sever Valentine and Valentine Electric from the IFC defendants. We also reject any claim by the defendant Diaco that he was entitled to a severance on these same grounds.

C. *Comment on Valentine's Failure to Testify:*

During the course of his summation, the prosecutor made the following statement:

> "Then at 7:25 that evening from Mr. Serota's own home he places a telephone call to Valentine Electric Company, a four-minute conversation. If this is so honest and above board, and unassailable, why is Mr. Serota and Mr. Valentine talking the night of the 16th? What purpose?
>
> *Counsel has given you no reason, no explanation for the relationship between Mr. Serota and Mr. Valentine.*" (emphasis added).

At that point, the attorneys for Serota and Valentine moved for a mistrial on the ground that the prosecutor's statement constituted a comment on their clients' failure to take the stand in violation of their fifth amendment rights. The district court denied the motion. However, it immediately instructed the jury that the defendants had no obligation to testify in their own behalf and that no adverse inferences could be drawn from their failure to do so.

On appeal, Valentine argues that the court erred in denying his motion for a mistrial. He contends that the obvious purpose of the prosecutor's remark was to call attention to his failure to take the stand since the "explanation" called for by the prosecutor could only have

been provided by his own testimony. Moreover, he maintains that this comment was so grossly prejudicial that its impact could not be vitiated by the district court's curative instructions.

In determining whether a prosecutor's remark constitutes an improper comment on an accused's failure to take the stand in his own behalf, the proper test is "whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify". *United States v. Chaney*, 446 F.2d 571, 576 (3d Cir. 1971). After carefully examining both the contents of the prosecutor's statement and the context in which it was made, we are convinced that it was neither intended as such a comment nor of such a nature that the jury would necessarily construe it in that fashion.

We think it clear that the prosecutor was merely highlighting the failure of defense counsel, in their summations, to challenge critical evidence against their clients. The fact that Valentine and Serota had been conferring with one another at that particular time was certainly significant since it tended to establish a relationship between them during the period of the alleged bribery scheme and thus substantiated Sutton's testimony. However, while they offered explanations for much of the evidence in the case, neither Serota's nor Valentine's counsel made any effort to explain away this conversation in their closing arguments. In pointing out this failure on the part of defense counsel in his summation, the prosecutor was well within the bounds of legitimate advocacy. *E.g., United States v. Day*, 384 F.2d 464 (3d Cir. 1967); *United States v. Joyner*, 492 F.2d 650 (D.C. Cir. 1974).

In any event, the district court took more than adequate measures to protect against any possible prejudice to Valentine resulting from this single remark in the prosecutor's lengthy, but controlled, summation. Its immediate cautionary instructions insured that no juror would mis-

construe the prosecutor's statement as an adverse comment on Valentine's failure to testify.

We therefore find no error in the district court's refusal to grant a mistrial on the ground that the prosecutor had improperly commented on Valentine's failure to take the stand in his own behalf.

IV. *Issues Not Passed On By The District Court:*

A. *Exclusion of Newark Area Residents from the Jury:*

Prior to trial, defendant Diaco, along with a number of other defendants, moved for a dismissal of the indictment or, in the alternative, a change of venue or vicinage because of the allegedly adverse publicity given this case in the Newark area. As previously noted, the district court decided to select the jury from the Trenton area in response to the alternatives in this motion. However, in doing so, it made no findings as to whether the alleged publicity precluded a fair trial before a Newark jury. Rather, the requested change in vicinage was apparently granted to insure that no issue concerning such publicity would thereafter arise.

Diaco now claims that the adverse publicity which motivated his request for a change in vicinage was generated by the government. But for this publicity, he maintains, he would have been tried before a jury composed of residents of the Newark area, the vicinage in which the alleged crime occurred. Hence, he argues that the government, through this publicity, effectively excluded Newark area residents from the venire, and thus denied him his sixth amendment right to be tried by a jury composed of a fair cross-section of the community.

In order to resolve Diaco's claim, findings as to both the nature and source of such publicity in the Newark area would be necessary. However, such findings are totally absent on the record before us. Moreover, in pressing this

argument in this Court, Diaco has failed to point us to a single record reference—and our independent examination of the record discloses none—indicating that he raised this objection below. Accordingly, we can only conclude that this argument was not presented to the district court. Since it appears that this claim is now raised for the first time and that findings necessary to provide the factual predicate for its resolution were neither sought nor made in the district court, further consideration of Diaco's claim is unnecessary. *See Government of the Virgin Islands v. Gereau*, 502 F.2d 914, 937 (3d Cir. 1974). This argument meets the same result to the extent it is put forward by any defendant other than Diaco.

B. *Denial of Haymes' Right to Counsel of His Choice:*

During the pre-trial proceedings, a question arose as to the propriety of Haymes' attorney's continued representation of his client. Haymes' attorney had previously served as counsel for IFC and, in that capacity, apparently attended several meetings between Sutton and the IFC defendants. The government felt that as a result of his presence at those meetings he might possibly be called as a witness during the upcoming trial.

Upon learning of this problem, the district court directed all counsel to submit their positions on the issue in letter form. The responses were not particularly enlightening since the government merely reiterated its concern over Haymes' attorney's status as a potential witness while counsel for Haymes' co-defendants essentially indicated that without further information they could take no position on the matter. Haymes' attorney, on the other hand, manifested his intent to remain in the case unless directed to do otherwise.

Thereafter, the court held an *in camera* hearing to further consider the issue. This hearing concluded with an

order directing the government to prepare a delineation setting forth any anticipated testimony of Sutton relevant to the matter so that Haymes' attorney could make an informed decision as to the propriety of his continued participation in the case. However, before this delineation could be prepared, Haymes' attorney requested permission to withdraw with the approval of his client. The court granted this application nearly four months prior to the commencement of trial.

Haymes now contends that the actions of both the district court and the government effectively "forced" his attorney out of the case and thus denied him his sixth amendment right to counsel of his choice.[14] However, no factual support for this contention appears on the record before us. Rather, the record merely indicates that the court began investigating a potential conflict of interest problem bearing on the propriety of Haymes' attorney's continued representation of his client, and that before this matter could be resolved, Haymes' attorney voluntarily withdrew from the case with the consent, albeit reluctant, of his client. Because of this voluntary withdrawal, the district court was never called upon to determine whether the alleged conflict of interest was such that it necessitated the withdrawal of Haymes' attorney or what consequences a withdrawal under those circumstances would have on Haymes' right to counsel of his choice. Since it thus appears on this record that the voluntary withdrawal of counsel prevented his sixth amendment claim from ever materializing in the district court, we decline to grant it any further consideration.

C. *Brady Claim re: James Silver:*

During the course of both pre-trial proceedings and the trial itself, the defendants made repeated motions

14. To the extent that Haymes' asserts that the district court erred in refusing to grant him a severance on this basis, we find no merit in his argument.

pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), seeking the disclosure of any exculpatory information in the possession of the government. In response to these repeated requests, the government, acknowledging its "continuing duty" under *Brady* to provide the defense with such information, represented that it had discharged such obligation. Indeed, it turned over a great deal of material. In addition, the district court accepted the prosecution's representations with respect to its *Brady* obligations.

The defendants now contend that the government violated its *Brady* duties by failing to disclose to them the existence of one James Silver and the contents of communications made by him to representatives of the F.B.I. and the United States Attorney's Office for the District of New Jersey. The defendants assert that this information, which was in the government's possession prior to trial, would have materially aided them in discrediting the testimony of Sutton, the government's key witness. The government, on the other hand, while admitting that such information was in its possession, vigorously argues that it was not the subject matter of *Brady* production, and even if so, that its failure to disclose it to the defendants was harmless.

No *Brady* claim concerning Silver, however, was presented to the district court during either the trial or the post-trial proceedings. This claim was raised for the first time in a motion filed with this Court seeking the disclosure of all documentary evidence concerning Silver in the government's possession. The government responded to this motion by filing the requested materials *in camera* with this Court. After examination, we directed that it be turned over to the defendants in order that they might determine whether to pursue their claim. Thereafter, these documents became the subject matter of oral argument before this Court and we permitted counsel to submit post-argument briefs in support of their positions.

After due consideration, we find it inappropriate to resolve defendants' *Brady* claim in the first instance. The

defendants allegations concerning Silver, if true, are relevant to the establishment of cause for a new trial. As such, they should be first presented to the district court on an appropriate Rule 33, Fed. R. Crim. Proc., motion. Of course, our decision in this response is without prejudice to any action which the defendants may wish to take in the district court. And, since we decline to pass on this matter, we express no opinion on the merits of defendants' *Brady* claim. *United States v. McCrane*, 527 F.2d 906, 914 (3d Cir. 1975).

We have considered all other contentions raised by the defendants and find them without merit.[15]

Accordingly, the judgments of conviction of all defendants under Count III of the indictment will be reversed and this case remanded to the district court with directions to enter judgments of acquittal for the defendants on that count. The defendants' convictions under Count I will be vacated and the cause remanded for further proceedings not inconsistent with this opinion. The judgments of conviction on Count II will be affirmed.

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15. These contentions include the government's alleged *Brady* violation in refusing to disclose, prior to trial, any testimony of Sutton that was the basis for the second indictment in this prosecution which contradicted the allegations contained in the third indictment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

(A.O.—U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX B

Memorandum Opinion of the United States District Court on Post-Trial Motions, May 9, 1975

IN THE

UNITED STATE DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Criminal No. 74-555

UNITED STATES OF AMERICA,

v.

NORMAN DANSKER, STEPHEN HAYMES, DONALD ORENSTEIN, NATHAN SEROTA, INVESTORS FUNDING CORPORATION, JOSEPH DIACO, ANDREW VALENTINE and VALENTINE ELECTRIC COMPANY,

Defendants.

Newark, New Jersey,
May 9, 1975.

By:

The Honorable FREDERICK B. LACEY, U.S.D.J.

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LACEY, District Judge:

The several defendants have moved post-trial for judgment of acquittal, a new trial and for arrest of judgment on various grounds.

Dealing with the motions made by the defendant Serota, he has moved pursuant to Rules 29, 33 and 34, urging the following:

1. That he was prejudiced by joinder and by the introduction of evidence not applicable to the case against him;

2. That the government improperly commented upon his failure to take the stand; and

3. That the verdict was against the weight of the evidence.

At the close of all the evidence, I granted the defendant Serota's motion for judgment of acquittal on Count I, a conspiracy count, and Count II, a substantive count. The dismissals followed my determination that at the heart of these two counts was the attempted bribery of Mayor Ross and that the government produced no evidence which indicated that Serota was involved in any agreement, or in any substantive act, related to such attempted bribery.

This left standing as to Serota only Count III. As I stated at trial, I considered under the *Geaney* formulation [*United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970)] whether mistrial and severance were then indicated, or whether Serota's rights under Count III would be adequately protected by a carefully drawn jury instruction to disregard in their consideration of the charges against him the hearsay evidence offered on the conspiracy count, Count I,

and on the substantive count, Count II. I determined that, under the unique circumstances of this case, the latter procedure was appropriate. In so doing I reviewed at length the hearsay and so-called Count II evidence and pointed out the considerable extent to which this evidence was completely consistent, or congruent, with what Serota himself conceded was the case. I thereafter carefully instructed the jury as to the only evidence they could consider.[1]

Under the circumstances peculiar to this case, I am still of the view that Serota's rights were protected and thus deny his post-trial motions to the extent they are based upon the grounds hereinabove set forth. In doing so, I note that movant's argument fails to analyze the extent to which the government and Serota were in accord as to the critical facts in the case against Serota. Through his counsel's opening and final argument, and highlighted by counsel's reading of Serota's Grand Jury testimony to the jury in final argument, and his cross-examination of the witness Sutton, the jury saw it conceded by Serota's counsel that his client had entered into a deal, the terms of which the jury could well infer cast a shadow of wrongdoing.

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[1] *See, United States* v. *Somers*, 496 F.2d 723, 730-731 (3d Cir.), *cert. denied*, —— U.S —— (1974); *United States* v. *DeLarosa*, 450 F.2d 1057, 1063-1064 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972).

Defendant contends that he was prejudiced by the evidence going to Count II, the substantive count on the Ross bribery. This is nothing more than an argument that he may have had a better chance if he had been tried separately. This did not entitle him to a separate trial. *United States* v. *Somers, supra*, 496 F.2d at 730. *United States* v. *Perez*, 489 F.2d 51, 67 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974).

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Thus, it was conceded—and Serota's counsel put into evidence the contract evidencing same—that Serota agreed to take from Sutton $900,000 for an apartment worth at most about half that sum. This apartment was not within the area of the George Washington Plaza Project.

The signs of wrongdoing were underscored by provisions of the agreement which gave Serota the right to stay in the apartment by paying only maintenance charges, and with the right to repurchase it under terms I shall deal with subsequently.

Thus, Serota disputed very little, even as late as counsel's final argument, of what the government contended. He did, it is true, argue that Serota was to get under the agreement only $900,000 from Sutton, and not $1,100,000; but this is hardly a substantial difference in degree in view of what appeared concerning the value of the apartment, Serota's continued right to live there and his right to regain title for $300,000, a profit of $600,000 on Serota's figure, or $800,000 under the government's argument.

What was Serota's explanation to the jury as given by his counsel? His counsel sought to compare the Serota transaction with those involving persons known as Jay and Weber. This comparison faltered, however, since these people owned property which was necessary to clear the George Washington Plaza Project tract, whereas Serota's apartment was not within the project area. The jury was left, then, to wonder what the reason was for this apparent largesse. Serota's counsel never really did give a convincing explanation; for there was no way to give this transaction a patina of innocence.

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Instead, counsel, freely conceding, as I have said, the essentials of the transaction, somehow endeavored to put it in terms of Serota having a First Amendment right first to oppose the project, and then to change his mind (for whatever reason) and favor it. This theme was injected, by a Serota Request to Charge, into my instructions to the jury. Beyond this, the Serota Grand Jury minutes, put into the case by the government, were deemed by Serota's counsel supportive of his position, so much so that he concluded his summation by a lengthy quotation of Serota's statement to the Grand Jury wherein he set forth his position, one he explicitly said he was not proud of, but which he claimed was not of a criminal nature.

When all is said and done, then, what was the bone of contention between Serota and the government? It was this: Did Serota simply agree to vocally support the Plaza project (reversing his earlier stand) or did he agree to do more, namely, as the government charged, to join in corruptly influencing official action related to the project? This narrow issue was posed to the jury along with the specific items of non-hearsay proof they could consider.

Accordingly, I shall adhere to my ruling at trial on this issue.

Serota claims joinder here resulted in prejudice to him because his counsel could not get into certain specifics in his cross-examination of Sutton. During trial I had occasion to refer to the slashing, skillful and lengthy cross-examination by highly competent and experienced counsel. Every possible credibility issue was fully exposed. Thus, the jury was able to make a "discriminating appraisal" of his credibility. *United States* v. *Mallah*, 503

F.2d 971 (2d Cir. 1974). *Cf. United States* v. *Somers, supra,* where the Third Circuit found no abuse of discretion in the ruling of the trial court denying defendant's motion to recall a government witness to establish that the underlying crime to which the witness pled guilty involved perjury. 496 F.2d at 733-734. Accordingly, I find no basis now for revising my view at trial that the interests of all the defendants were fairly accommodated by the cross-examination I permitted as to the crimes to which Sutton pleaded guilty.

Serota renews, as well, his argument based on alleged improper joinder. For the reasons hereinabove set forth, as well as those previously embodied in earlier opinions; this portion of Serota's motions is denied.

Nor do I find merit to Serota's claim he is entitled to a new trial because of the government's alleged comment upon Serota's failure to take the stand.

Defendants' counsel, on cross-examination of Mayor Ross, and in final argument, had disparaged Ross' calling in the government when he was allegedly first contacted by the defendant Diaco. (Tr. 3341-3347; 3354-3363) Thus, they suggested he had lured Diaco on, and had really been more interested in advancing himself politically than manifesting integrity and incorruptability. There were two public officials involved in the alleged bribery, Ross and Serota. The government's argument (Tr. 3771-3772) was thus a legitimate one: The United States Attorney was pointing up that the alleged bribers had set out to bribe two public officials. One had refused the bribe and had "come forward" to report the matter, to cooperate with the government, and to testify. The other (Serota) had not rejected the bribe, and had

therefore been made a defendant. That this was clearly the import of the government's argument is, of course, manifested by the fact that counsel for the defendant Serota did not object at the first drawing of this parallel between the two public officials. Tr. 3772.

The words "coming forward" are the key. Ross "came forward," Serota did not. This is not a case of two people to a transaction who are opposed to each other, and one (A) testifies to one set of facts, and the other (B) does not. Under such circumstances, it would be wrong to argue that A had "come forward" and testified, but B had not.

Serota's argument would be appropriate had the government referred to Sutton's testimony as to certain conversations he had with Serota, argued that Sutton had "come forward" and testified, but Serota had not. Thus the jury would have the implication put to it that Serota had not contradicted what Sutton had said.

Illustrative, too, of the point that the government's argument was that one public official had acted properly and the other had not, rather than that Serota had not testified in his own defense, is the fact that the argument was addressed simply to Ross vis-a-vis Serota, and to no other defendant.

Serota also claims error lay in another portion of the government's summation, at Tr. 3831-3832. This time his counsel did object at sidebar. Again, however, I find the argument to have been a legitimate one. Serota's counsel had argued that Serota had throughout his dealings with Sutton acted properly (Tr. 3497-3514) and, to underscore this, read to the jury a portion of Serota's Grand

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Jury testimony wherein Serota told the Grand Jury he has suspected corruption in Fort Lee and that he had told Mayor Ross he was not going to stand for it. Tr. 3577, et seq. The implications to be drawn from this were that if there was corruption in Fort Lee, it was Ross who was involved and that Serota was, to adopt the government's phrase, "a paragon of virtue." The government's argument went as follows:

> Nathan Serota is a public official in the State of New Jersey. Counsel would have you believe that he was a paragon of virtue. Counsel read you his grand jury testimony yesterday:
>
> "Burt, there is something wrong in town, I'm not going to stand for it, there is something wrong. As long as I live here, forget it, I'm going to fight, Burt, so don't get your fingers in the wrong pie. Burt, I'm going to fight like hell against a project of this size, it's absolutely impossible, it don't belong."
>
> And then "Are you accusing me?"
>
> Burt Ross exited from his pulpit.
>
> "Are you accusing me?"
>
> "If the shoe fits, wear it."
>
> "I'm accusing somebody here of doing dirty work in Fort Lee."
>
> This paragon of virtue, this public official knew there was corruption in town, he was going to fight it. And unlike the other public official in this case, Mayor Ross, this public official signed that con-

> tract, took those moneys, both in escrow and in cash. That's the difference in this case. An attempt to buy these corporate individual defendants, that they could not achieve legally, to buy it through illegal means, to buy approvals before the Board of Adjustment, to buy both sides in an election so that it then could be approved by the Borough Council.
>
> That's what this case is all about and it's about an attempt to buy two public officials, one on either side. One man did come forward and one man did not.
>
> The man that came forward testified. The man that did not come forward is a defendant in this case. (Tr. 3831-3832)

I find this contrast to fall within the realm of proper argument, and a proper response to counsel's claim of propriety for Serota's activity. Among other things, Serota's counsel, by his having read Serota's Grand Jury testimony and argued therefrom, invited the response which was designed to show that Serota's profession of righteousness before the Grand Jury should be rejected by the jury as untrue.

Applying a test enunciated by this Circuit in *United States* v. *Chaney*, 446 F.2d 571, 576 (3d Cir.), *cert. denied*, 401 U.S. 993 (1971), I do not find that the prosecutor's language "was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."

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Even if the prosecutor's remarks here could be properly taken to be a comment upon Serota's failure to testify, no prejudice flowed therefrom. The jury could hardly be said to have been unaware of Serota's failure to take the stand, particularly in view of the fact that none of the several defendants took the stand. Indeed, Serota's silence at trial was emphasized by his counsel's quoting his Grand Jury testimony.

Moreover, when counsel did object to the government's remarks I immediately instructed the jury that there was no obligation on the part of a defendant to put in a case or take the stand and that no inference against him could be drawn from a failure to testify. Tr. 3824, 3825. Moreover, I gave the same instruction in my final instructions to the jury. Tr. 3855-3856.[2]

Serota's counsel also singles out for attack the following argument of the prosecutor:

> "And the telephone toll records in this case, ladies and gentlemen, establish that on May 16th shortly after Mr. Sutton talked to Mr. Valentine there was an 8-minute telephone call from Valentine Electric

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[2] Defendant Haymes also argues that the prosecutor's remarks constituted improper comment on his failure to testify; however, the remarks were made in response to Serota's arguments on summation and were not directed at any other defendant. Counsel for Haymes failed to object to the remarks he now contends were improper.

Though out of context, I deal with Haymes' contention that there was error in the prosecutor's expression of a personal opinion on Sutton's credibility. Read in context, the challenged remark was not error. Tr. 3825.

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Company to Elota Realty, from New Jersey to New York.

"Then at 5:29 another 10-minute telephone call from Valentine Electric Company to Elota Realty, ten minutes.

"Then at 7:25 that evening from Mr. Serota's own home he places a telephone call to Valentine Electric Company, a 4-minute conversation. If this is so honest and above board, and unassailable, why is Mr. Serota and Mr. Valentine talking the night of the 16th? What purpose?

"Counsel has given you no reason, no explanation for the relationship between Mr. Serota and Mr. Valentine." (Tr. 3821-3823).

Serota's argument is that this was somehow a reference to evidence which had been produced, accompanied by argument of the prosecutor that it was not contradicted, when in fact only Serota could contradict the testimony.

The prosecutor, of course, had a right to refer to what was a critical piece of evidence. It demonstrated a connection between someone in Valentine Electric Company and Serota, the only explanation of which was given by Sutton, an explanation incriminatory of both the Valentine defendants and Serota. In addition to that reference, the prosecutor also had a right to point out that Serota's counsel, while arguing Serota's innocence, and providing certain explanations of the evidence, had failed to explain why Serota and someone at Valentine Electric Company would be conferring or talking. I find this ap-

propriate comment. *United States* v. *Joyner*, 492 F.2d 650, 654 (D.C. Cir. 1974); *United States* v. *Holmes*, 452 F.2d 249, 272 (7th Cir.), *cert. denied*, 405 U.S. 1016 (1971); *Hollbrook* v. *United States*, 441 F.2d 371, 373 (6th Cir. 1971); *United States* v. *Reid*, 415 F.2d 294, 296 (10th Cir. 1969).

Concluding my discussion on this point, as I have noted, I find that the prosecutor's argument was not intended as a comment on the failure of Serota to testify and was not such as would cause in the words of *Chaney*, "the jury. . . . [to] naturally and necessarily take it to be a comment on the failure of the accused to testify." Indeed, in the light of the unrestrained attacks upon the government's witnesses (and its failure to call certain witnesses) by defendants' counsel in their summations, with the implied criticism of the government's professional ethics, the government's final argument was moderate and well controlled both in its content and delivery. This approach was predictable in that Serota's counsel had earlier sought and achieved setting of certain guidelines for the government's summation even before it was delivered. Tr. 3742 *et seq.*

Likewise of interest is that in discussion prior to the government's summation, Serota's counsel indicated he would object if the government referred on summation to his failure to support by testimony counsel's argument of a good faith reliance upon legal advice by his client. He indicated that such a reference would be regarded by him as a comment upon Serota's having called no witnesses and not having testified. Other defense counsel then, most significantly, made the point that such a comment, and the inference therefrom as to Serota, would

have the same jury impact upon them as upon him. Tr. 3748. Given this understanding, it is noteworthy that, when Serota's counsel later objected to the government's argument, as hereinabove set forth, no other counsel objected (except for Valentine's counsel, as to the Serota-Valentine reference, Tr. 3823). Indeed, even now only counsel for Haymes objects. 11, n. 2, *supra*. All experienced and able trial lawyers, they obviously did not see the government's remarks as Serota's counsel did, even after he objected and argued at sidebar.

When I instructed the jury following counsel's objection, Tr. 3835, that no defendant had to take the stand or put on a defense, I then stated to government counsel ". . . . I'm not saying you gave counsel reason to object. On the other hand, I'm not saying that you didn't. But—will you please proceed." Tr. 3835. This was intended to suggest that the matter had been covered and that I saw no reason at this stage to point out further that Ross had "come forward" and Serota had not. I did not then nor do I now perceive the comments as does Serota's counsel.

Serota—as well as the other defendants—also argues that the verdict was against the weight of the evidence. Alternatively, motions are made for judgment of acquittal and for new trial by defendants other than Serota, on the basis of Sutton's alleged perjurious testimony.[3]

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[3] Serota's motion for arrest of judgment is grounded upon claims that no defense was charged and that jurisdiction was lacking. This motion was previously made and denied. I adhere to my earlier ruling.

(Footnote continued on following page)

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As Serota argues, to convict Serota on Count III, the government had to establish that he was a public official; that he agreed to assist in influencing official approval for the George Washington Plaza project; that he acted with specific intent to break the law; and that he acted with a corrupt intent. I find that there was sufficient evidence for the jury to have found beyond a reasonable doubt that these elements were proved.

Thus, in addition to the undenied facts of the apartment transaction, the government produced evidence that at a meeting of Serota, Sutton and Orenstein, in Serota's Rolls Royce, when Sutton asked Serota, "What about the hearings? How are [we] going to get helped," Serota replied, "We can take care of the hearings. We'll cooperate with you . . . Had I know you prior to this one, Mr. Orenstein . . . probably you wouldn't have half the trouble we have now." Tr. 1488. The jury could reasonably infer that Serota agreed to take affirmative action when he said he would "take care of the hearings."

In addition, as has been noted, the contract for the sale of Serota's apartment provided that he could repurchase

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(Footnote continued from preceding page)

The IFC defendants contend that evidence of the pre-conspiracy relationship between Sutton and the IFC defendants was improperly admitted. This issue was extensively briefed and argued prior to trial and was the subject matter of an opinion read into the record by me. Tr. 1525-1541. My instructions (Tr. 1424, 1442, 3934-3940) limited the jury's consideration of this evidence. Thus, the arguments of these defendants are rejected. Defendant Diaco's motion is limited to Count III of the indictment. Although defendant Dansker did not specifically file a motion pursuant to Fed.R.Crim. P. 29(c), he requested "such other relief" sought by his codefendants.

the apartment for $300,000 after selling it for $900,000, but that if the building permit for the project had not issued by April of 1975 the contract would terminate. The jury could reasonably infer that these provisions were included to provide incentive for Serota to abide by his agreement to take affirmative action to see that the permit issued.

Finally, Serota testified before the Grand Jury that he agreed to induce his slate of candidates to accept a "reduced plan."

Thus there was sufficient evidence before the jury from which it could reasonably infer that Serota agreed to take affirmative action to secure official approval of the project. Defendant offered no evidence to rebut that inference. He cannot now complain that the verdict was against the weight of the evidence. *See Government of the Virgin Islands* v. *Lake,* 362 F.2d 770, 774 (3d Cir. 1966).

As to all other defendants, there was sufficient evidence to support the jury's verdict. The recordings and Ross' testimony obviously implicated the defendant Diaco beyond almost any doubt if the jury believed, as obviously it did, that it was Diaco who spoke with Ross.[4]

Valentine's guilt was also established. Diaco's coming on the scene was brought about by Valentine, according to Sutton. Working back from the conversations between

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[4] Indeed, that this is so is recognized by Diaco's counsel who has moved for a new trial based on an alleged lack of evidence only as to Count III where, as the arguments at trial demonstrate, defendants contend that there was no crime because any payments to the defendant Serota were not payments to a "public official".

Diaco and Ross, the pattern that these took, specifically that Ross would be rewarded for causing an adjournment of the meeting of the Board of Adjustment, and, after the meeting was held, that he would be rewarded for causing the project applications to be restored to the calendar of the Board of Adjustment, matched the earlier conversations between Valentine and Sutton.

In view of the business relationship between Valentine and Diaco, and the fact that it was Valentine Electric Company whose interests Valentine sought to advance, according to Sutton, the jury could well infer that Diaco was utilized by Valentine to carry out those commitments which Valentine made with Sutton.

Additionally, as to Valentine, Sutton testified that he had given a check to Valentine for $270,000 which was not backed by sufficient funds. This is supported by evidence showing that this check was deposited in a bank account maintained by Valentine Electric Company and that it was, in fact, unsupported by sufficient funds when put through for payment.

Additionally, there were numerous pieces of documentary proof in the form of telephone slips showing telephone conversations between persons at Valentine Electric Company and Sutton, and between persons as Valentine Electric Company and persons at Serota's telephone numbers.

Thus, the testimony as to Valentine's guilt was only slightly less overwhelming than as to the guilt of Diaco, assuming, as we must, that the jury chose to credit it.

As to Messrs. Dansker, Haymes and Orenstein, obviously the jury chose to believe Sutton's testimony as to his having taken up with them the subject of the alleged

bribes to Ross and Serota and their having not only approved the payments but, as well, having agreed to reimburse Sutton for those payments.

There was evidence corroborating Sutton's explanation of how the so-called IFC defendants reimbursed him for the illegal payments. By way of example, Sutton's testimony concerning conversations, relative to $50,000 he required to make certain payments was supported by documentary proof in the form of Balco checks emanating from IFC.

As to the two corporate defendants, there was sufficient evidence to support the jury's verdict, as well. I shall not further detail the evidence, having marshalled it for the jury at trial. Tr. 3919 *et seq.*

The motions based upon a claim that the verdict was against the weight of the evidence are denied.

The defendants other than Serota argue for judgment of acquittal on Count III, claiming that there was no proof that when the payments were made to Serota that it was known that he was a public official. Applying the law of New Jersey to this count, it is not necessary, as I view it, that payments be made to one known to be a public official for the crime of bribery to be committed. *See, State* v. *Begyn,* 34 N.J. 35 (1961); *State* v. *Ferro,* 128 N.J.Super. 353 (App.Div.), *cert. denied,* 65 N.J. 566 (1974); *State* v. *Sherwin,* 127 N.J.Super. 370 (App.Div.), *cert. denied,* 65 N.J. 569 (1974).

If, however, I am in error in my construction of the law of New Jersey relating to bribery, defendants' position is no better. That Serota was a public official in Fort Lee is clear and in the absence of proof to the contrary

the jury was entitled to infer that Sutton, and the other alleged conspirators, knew of his status as such.

Defendants on their motions for new trial attack Sutton's credibility. In marshalling the evidence for the jury in my final instructions, I set forth for its consideration various factors relating to Sutton's credibility which were brought out by the evidence and argued by defense counsel in final argument. Additionally, I charged (as requested by defense counsel) on the accomplice charge and the hope for leniency expressed by Sutton. The jury, having heard 4-5 days of cross-examination devoted extensively to credibility, the scathing attacks upon Sutton by defense counsel in their summations, and my final instructions, chose to believe Sutton, or at least indicated by their verdict that they believed him on the critical aspects of his testimony implicating the defendants. Thus, I must reject defendants' position that Sutton's testimony on the critical aspects of the case should be rejected.

First, it should be noted, this is not a case where a defendant has testified contrary to a government witness. Thus, in large measure, Sutton's testimony was uncontradicted. Moreover, it was corroborated in many instances, not only by documentary evidence but in certain particulars, such as his dealings with Valentine and Diaco, by the testimony of Mayor Ross (and the tape recordings). Under the circumstances, therefore, the motion for new trial is denied.

When at trial I granted Serota's motion for judgment of acquittal on Counts I and II, Count I was redacted to eliminate the word "bribe" in characterizing the payments which were charged in Count I to have been made to Serota. Counsel for the defendants other than Serota did

not, however, move to have stricken from Count I all of the allegations referring to these payments or the evidence relating thereto, although they did argue that, under Count III, the evidence had not proved beyond a reasonable doubt that their clients had committed the crime charged, and that the jury should be instructed to disregard evidence relating to hearsay conversations involving Serota and nonconspirators.

Nonetheless, counsel now contend that Count III should have been stricken, and that all of the testimony related to payments to Serota, whether they be bribes or not, should have been stricken, notwithstanding the allegations of Count I. The failure to do so, they now argue, constituted error in such a degree as to require a new trial.

Quite aside from the belated nature of the application, it is rejected on its merits. Even if Count III had never been charged, that is, even if all of the defendants, including Serota, had not been charged with a substantive crime of alleged bribery of Serota, the facts related to the payment to Serota would have been probative of the issues involved in the conspiracy charged in Count I. This is so because the intended bribery of Mayor Ross, based upon the proofs at trial, was not intended to occur, and could not have been undertaken, until Serota's "cooperation" had been secured. Probative of the securing of said "cooperation" was Sutton's testimony concerning his conversations with the various defendants as to how to secure Serota's aid, how to raise the money to do so, and, generally, how to accomplish the transaction which involved the so-called purchase of Serota's apartment. To make the point crystal clear, the evidence related to the Serota transaction was admissible not only under Count III but under Count I as

well, redacted or not redacted, and would still be admissible under Count I even if Count III were now to be stricken.

The defendant Valentine contends that he was prejudiced by the summation of counsel for Haymes. A careful review of that summation reveals no such error as is claimed by Valentine's counsel. The fact is that counsel for Haymes in his summation engaged in a forceful attack on Sutton's credibility and argued that even if there was some evidence against one or more of the other defendants, there was substantially less against his client, Haymes.

Accordingly, this application is rejected on its merits. It is additionally noted that counsel did not object at the time Haymes' counsel was speaking to the jury; instead, he waited until this summation was at an end and then did not ask for any curative instruction.

In view of the foregoing, all of the defendants' post-trial motions are denied.

An appropriate order should be submitted.

Dated: May 9, 1975.

FREDERICK B. LACEY,
United States District Judge.

APPENDIX C

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1685/92

UNITED STATES OF AMERICA,

v.

NORMAN DANSKER, JOSEPH DIACO, STEVEN HAYMES, WARNER NORTON, DONALD ORENSTEIN, NATHAN L. SEROTA, ANDREW VALENTINE, INVESTORS FUNDING CORPORATION OF NEW YORK, VALENTINE ELECTRIC COMPANY,

Norman Dansker, Appellant in No. 75-1685
Joseph Diaco, Appellant in No. 75-1686
Stephen Haymes, Appellant in No. 75-1687
Donald Orenstein, Appellant in No. 75-1688
Nathan L. Serota, Appellant in No. 75-1689
Andrew Valentine, Appellant in No. 75-1690
Valentine Electric, Appellant in No. 75-1691

Investors Funding Corp. of New York,
Appellant in No. 75-1962

(D. C. Criminal No. 74-555)

Appendix C

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court filed June 5, 1975, be, and the same are hereby affirmed as to the judgments of conviction on Count II; and it is further ordered that the convictions of the defendants under Count I be and the same are hereby vacated and the cause remanded to the said District Court for proceedings not inconsistent with the opinion of this Court; and it is further ordered that the judgments of conviction of all defendants under Count III of the indictments be and the same are hereby reversed, and the cause remanded to the said District Court with directions to enter judgments of acquittal for the defendants on that count.

ATTEST:

THOMAS P. QUINN
Clerk

June 2, 1976

APPENDIX D

Order of the United States Court of Appeals for the Third Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 75-1685, 75-1687
and 75-1688

UNITED STATES OF AMERICA

v.

NORMAN DANSKER, *et al.*,

NORMAN DANSKER, Appellant in 75-1685
STEVEN HAYMES, Appellant in 75-1687
DONALD ORENSTEIN, Appellant in 75-1688

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges

who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

COLLIN SEITZ,
Judge

Dated: July 7, 1976

APPENDIX E

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-38

NORMAN DANSKER, *et al.*,

Petitioners

v.

UNITED STATES

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 3, 1976.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court
of the United States

Dated this 26th day of July, 1976.

Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-334.

NORMAN DANSKER, STEVEN HAYMES AND
DONALD ORENSTEIN,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Reply to Brief for the United States in Opposition.

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Reply to Brief for the United States.

The government's brief in opposition (hereinafter "Opp.") implicitly concedes the two major contentions raised by the IFC defendants in their petition (No. 76-334): (a) that the court of appeals' affirmance of the remaining substantive count charging the bribery of Mayor Ross (count II) is inconsistent with that court's reversal of the umbrella conspiracy

count (count I) (Opp. 8); and (b) that the jury's conviction of the IFC defendants under count II must be presumed to have been based on the trial court's instruction that if the jury found the IFC defendants guilty of conspiracy under count I, it could convict those defendant's under count II solely on the basis of their vicarious liability for the acts of their co-conspirators Sutton and Diaco, without believing any evidence that the IFC defendants participated personally in or even knew about the bribery of Ross (Opp. 10). In light of these two critical concessions, the government is forced into the uncomfortable posture of arguing: (a) that the inconsistency between the lower court's affirmance of the count II bribery charge and its reversal of the count I conspiracy charge does not require reversal of count II because "the court of appeals erred . . . in vacating the conspiracy-count and remanding it for a new trial" (Opp. 8); and (b) that the IFC defendants were properly held criminally responsible for the Ross bribery even if their convictions under count II rested solely on a theory of vicarious liability derived from their involvement in the non-criminal Serota scheme. As will be demonstrated below, both of these arguments are self-defeating and require reversal of the remaining Ross bribery count; or, at the least, they require a remand to the court of appeals for reconsideration of its judgment in light of the dramatic new shift in the government's legal position.

(a) The government's first argument — that the inconsistency between the affirmance of count II and the reversal of count I does not require reversal of count II because it is based upon "an erroneous overturning" of count I (Opp. 8) — is premised on an absurd twisting of logic. The government concedes, as it must, that since "[n]o petition for a writ of certiorari to review that aspect of the judgment [overturning count I] has been filed by the government . . .," "the judgment of the court of appeals vacating the conspiracy convic-

tion can[not] be disturbed." Opp. 8, n. 3. Nor does the government dispute that the court of appeals' reversal of count I was predicated on that court's express conclusion that it was entirely possible, on the record of this case, "that the jury found that the defendants engaged in a conspiracy to bribe Serota *alone* in spite of its guilty verdict on Count II" (App. 17a; emphasis added). Indeed, the government specifically acknowledges that the lower court, in vacating and remanding the conspiracy count, considered but "*rejected* the government's argument that the jury's conviction of the defendants on both substantive counts necessarily showed that the jury found a conspiracy to bribe Ross." Opp. 6 (emphasis added).

Recognizing that the court of appeals' decision in vacating count I was premised on its determination that the jury must be presumed to have found *no* participation whatsoever by the IFC defendants in a conspiracy to bribe Ross, the government must face and answer the fundamental argument advanced by the IFC defendants. That argument, simply put, is that pursuant to the trial court's vicarious-liability instruction, the jury must be presumed to have convicted the IFC defendants of bribing Mayor Ross under count II *solely* by first finding these defendants guilty of conspiracy with Sutton and Diaco under count I (based on their conspiring to bribe Serota) and then imputing to the IFC defendants the corroborated and undisputed attempts by "co-conspirators" Sutton and Diaco to bribe Ross.

Because this result flows inexorably from the court of appeals' decision on count I — a decision which concededly "can[not] be disturbed" — the government is forced to concede that that court's reversal of the conspiracy count is inconsistent and cannot be reconciled with its affirmance of the remaining substantive count. Opp. 8. Yet by virtue of this concession, the government is faced with a Hobson's choice: either it must further concede that the reversal of

count I necessarily requires reversal of count II, or it must attempt to *defend* the lower court's affirmance of count II by *attacking* its reversal on count I. Plainly unwilling to make the first choice, which would concede the correctness of the IFC position, the government chooses to contradict its own express acknowledgement that the lower court's decision on count I "can[not] be disturbed" and to present the very argument which it concedes it may *not* properly present — namely, that count I was "erroneous[ly] overturned." Opp. 8.

Obviously uncomfortable with this twisted position, the government ultimately argues that this Court should deny review because the claimed inconsistency does "not present any general issue warranting review by this Court" (Opp. 8). The Government takes this position despite its implicit acknowledgement that the combined effect of the court of appeals' decision coupled with the government's concession of inconsistency is that the conviction of the IFC defendants on count II may be based solely on their innocent involvement in the noncriminal Serota scheme. This is an unconscionable position for the government to take. This Court, under its supervisory power, should not accede to a government request to leave standing a conviction which the government cannot logically defend in the face of a court of appeals decision that it may not legally challenge.[1]

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[1] The government's argument that since "inconsistency" between counts is not generally a basis for reversal of a *jury* verdict, "there is no reason for a different result when the decision of a court of appeals creates an inconsistent verdict" (Opp. 8), is historically and logically inaccurate and ignores the very different and critical functions of the jury and the reviewing court: while traditionally the jury is entitled to rely on its own vagaries of human thinking in determining guilt or innocence, the reviewing court is specifically endowed with the duty and obligation to apply reason and logical thinking to the facts and the law and to ensure that guilty verdicts are indeed *consistent* with principles of logic and law.

Moreover, as elaborated in the petition of the IFC defendants (Pet. 76-334, at 14-16 and 30-32), the issue at stake here — the issue of what guidelines the courts of appeals should apply in determining whether to reverse or sustain a substantive count when the umbrella conspiracy count under which it was tried is itself reversed on appeal — is indeed "a general issue warranting review by this Court"; it is, in fact, an important and increasingly recurring issue in the federal courts. The record of this case — which has been even further sharpened by the government's concessions before this Court — presents an ideal vehicle for clarifying the confused and critical area of federal appellate law dealing with this issue.[2]

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[2] The government attempts to dispose of the IFC defendants' claim that the issue at stake here transcends the particulars of this case by arguing (1) that the verdict on count II should not be disturbed because "the jury must have believed Sutton's direct evidence or it would not have convicted the IFC defendants . . . on both substantive counts" (Opp. 9); and (2) that in any event the IFC defendants' petition merely raises "contentions as to whether the jury . . . might have disbelieved admissible evidence [i.e., Sutton's testimony] directly supporting its verdict. . . ." Opp. 9. Both of these arguments, however, are belied by the record of this case.

First, as has been amply demonstrated (Pet. 76-334, at 8-9 and 18-19), in light of the undisputed tape-recorded evidence against Sutton and Diaco on count II, the lack of any such evidence against the IFC defendants under that count, and the trial court's instruction on vicarious liability which the jury must be presumed to have obeyed, it simply *cannot* be argued that "the jury *must* have believed Sutton's direct evidence or it would not have convicted the IFC defendants" on count II. Indeed, given the attack on Sutton's credibility, the possibility that the jury convicted the IFC defendants on count II without relying on Sutton's direct testimony is highly likely. See fuller discussion on this point in Pet. 76-334, at 18. (As to count III, as previously noted in Pet. 76-334, at 18, n. 11, the jury's conviction on that substantive count is also entirely consistent with a rejection of Sutton's testimony since there was ample documentary evidence establishing Serota's agreement to accept money and Sutton's testimony added nothing essential.)

Second, the government's derogation of the IFC position to one which does no more than raise "contentions as to whether the jury . . . might have dis-

(b) The government's second argument — that the IFC defendants were properly convicted under count II even if their convictions under that court were based solely on the jury's finding that the IFC defendants engaged in a non-criminal joint venture to purchase Serota's apartment (Opp. 9-11) — is so absurd that it falls of its own weight. The fundamental contention raised by the IFC defendants' petition is that under the trial judge's conspiracy instruction it must be presumed that

> "the convictions of the IFC defendants on Count II rested entirely on the theory of vicarious liability for the acts of alleged co-conspirators, and not at all on the individual determination of their guilt. Under this theory — which the jury was instructed to apply — the jury must be presumed to have convicted the IFC defendants of bribing Mayor Ross *solely by imputing to these defendants* the corroborated and undisputed attempts by 'co-conspirators' Sutton and Diaco to bribe Ross." (Pet. 76-334, at 17-18; emphasis in original.)

Significantly, the government nowhere disputes that this may indeed be what happened. See Opp. 9-10. Nor could it dispute this possibility since the government itself argues, in a related context, that "it must be presumed that the jury

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believed admissible evidence . . ." wholly mischaracterizes the IFC defendants' petition. As the IFC petitioners make perfectly clear (see Pet. 76-334, at 16, 30-31), their discussion of the evidence in this case is not intended to persuade this Court to substitute its judgment for that of the jury; rather, it is designed to demonstrate that this case constitutes a paradigmatic display of the three kinds of prejudice which may result from a joint trial of substantive conspiracy counts under an erroneous conspiracy theory which is later invalidated by the court of appeals. It is precisely because of the paradigmatic prejudice involved in this case — and not because the jury "might have disbelieved admissible evidence" — that the IFC defendants submit that this case warrants review by this Court.

obeyed" the trial court's instructions with respect to the liability of co-conspirators. Opp. 11. The government argues, however — incredible as this may seem — that the jury acted *properly* in holding that IFC defendants criminally responsible for the criminal acts of Sutton and Diaco, even if the underlying agreement between the IFC defendants and Sutton and Diaco was *not a criminal conspiracy*. Opp. 10. In support of this truly preposterous and unprecedented argument, the government invokes "basic principles of agency," which it thoroughly misunderstands and bizarrely misapplies to the facts of this case.

The government's "agency" argument comes down to a claim that simply because the IFC defendants joined with Sutton and Diaco in a "joint venture to obtain variances" — even though that "joint venture" was entirely legal — the IFC defendants must be criminally responsible for the unagreed-to illegal acts engaged in by their co-venturers Sutton and Diaco. When spelled out, the government's application of "agency" principles would hold the IFC defendants criminally liable for Sutton and Diaco's attempt to bribe Mayor Ross under the following circumstances: three businessmen (the IFC defendants) get together with two other persons (Diaco and Sutton) in an effort to secure certain zoning variances (an entirely legal and constitutionally protected activity); the three businessmen — after extensive consultation with eminent counsel[3] — agree with the two others to employ an entirely non-criminal and constitutionally protected means to achieve their joint goal, namely, to purchase, at an inflated price, the apartment of a private citizen who publicly opposes the variances (Serota), for the purpose of obtaining that citizen's agreement to terminate his public opposition to the variances.

[3] Serota did, in fact, receive an opinion letter from one of the most eminent law firms in New York City indicating that the transaction was entirely lawful.

Entirely unbeknownst to the three businessmen, the other two persons decide to offer an illegal bribe to a public official (Mayor Ross) in order to improve the prospects of securing the variances. The government argues that under the above set of facts, the three businessmen (the IFC defendants), *who never agreed to do anything illegal*, and who did not even *know* that their two other partners in the entirely legal venture (Diaco and Sutton) were contemplating an additional illegal means of securing the variances, would be criminally responsible for the illegal means employed by the two others, simply because the three businessmen had agreed with the two others to secure the variances by entirely lawful means. Petitioners submit that there is no principle of "agency" — or of any other branch of Anglo-American criminal law — that would hold these three businessmen vicariously liable for the illegal acts of the two others. The courts have unanimously held that when there is an agreement to achieve an entirely lawful end (here, the securing of variances) and when *some* of those entering into the agreement have decided among themselves to employ unlawful means (here, the bribing of Mayor Ross), the unlawful means may not be attributed to others without, at the very least, a specific instruction to the jury that it must find that the others *knew* that some of the group intended to use unlawful means. See, *e.g.*, *United States* v. *Spock*, 416 F. 2d 165 (1st Cir. 1969).

Since the court of appeals here concluded that on the record of this case the jury must be presumed to have found that the IFC defendants entered into an agreement *solely* to purchase Serota's apartment and *not* to bribe Mayor Ross, the government's "agency" argument simply cannot apply. When stripped of that argument, however, what is left of the government's position is simply its concession that the jury may well have found the IFC defendants guilty of count II exclusively on the basis of the trial court's instruction on vicarious lia-

bility — an instruction which presupposes guilt on the very conspiracy count which the court of appeals reversed. The logic of the government's own position thus supports the fundamental contention of the IFC defendants that the reversal and remand on count I compels the same result with respect to count II.

Moreover, the leading legal authority relied on by the government — *United States* v. *Alsondo*, 486 F. 2d 1339, 1346, 1347 (2d Cir. 1973) — also requires reversal of count II. In *Alsondo*, three defendants had been convicted for conspiracy to assault a federal narcotics agent and for the substantive offense of committing such an assault. Under the charge to the jury, two of the substantive convictions had been obtained under a theory of vicarious liability. On appeal, the conspiracy convictions were reversed on the ground that there was no proof that the defendants had agreed and conspired to commit an assault upon a *federal officer*. There was, however, ample evidence that all of the defendants had entered into a different *criminal* conspiracy — not the one charged — to assault or defraud a particular victim. Faced on rehearing with the question of whether to reverse the substantive convictions which had been obtained on the theory of vicarious liability, the court specifically found that in order to have rendered its (legally erroneous) verdict of guilty under the conspiracy count, "the jury must already have found an agreement — involving [all defendants] — to assault a victim (who turned out to be a federal officer) or to take money from him by fraud or force." 486 F. 2d at 1347. Accordingly, because there could be no question that the jury had found all defendants to have participated in a joint venture with an *illegal* purpose — even though not the precise one charged in the conspiracy count — the court declined to reverse the substantive convictions. The court stated, in words entirely supportive of the IFC defendants' position here:

> It is well established in this and other circuits that the admissibility of acts of *a joint criminal venturer against his partner in a crime* "rests on basic principles of agency and not on the presence of a conspiracy count."
>
> . . . . . .
>
> This finding of *criminal agreement* is sufficient, on general agency principles, to sustain defendants' liability for their co-conspirators' actions. . . . The jury's finding makes clear that [the defendants whose convictions were obtained under the vicarious liability theory] were part of a plot to commit the *crime* that actually occurred. On such facts, the finding of guilt as to each should stand. *Id.* at 1346, 1347 (emphasis added).

In the instant case, of course, the joint venture at issue — an entirely lawful venture to secure zoning variances by purchasing Serota's apartment — cannot be characterized as a "criminal agreement." Nor can the IFC defendants be characterized on the basis of their participation in that venture as "joint criminal venture[s]" or "partner[s] in crime." Indeed, under the court of appeals' decision, what must be presumed here — namely, that the IFC defendants entered into a *noncriminal agreement* to engage in a constitutionally protected and entirely lawful act — is precisely opposite from the finding of a joint *criminal* venture which undergirds the court's decision in *Alsondo*. Under the reasoning in *Alsondo*, the IFC defendants cannot be held vicariously liable under "basic principles of agency" for the unagreed-to criminal acts of a joint venturer who, without the knowledge of the IFC defendants, acted beyond the scope of the agreed-upon venture. Thus the *Alsondo* case — the authority most strongly relied upon by the government — not only offers no

support to the government's position; it directly supports the contentions of the IFC defendants and requires the reversal of their remaining conviction under count II.

Conclusion.

In the conclusion of their petition for certiorari, the IFC defendants requested that, if this Court decides against plenary review, it should, at the very least, remand the case to the Third Circuit for briefing and full argument on whether, in light of that court's reversal of the umbrella conspiracy count, a new trial is required on the remaining substantive count. Pet. 76-334, at 34. As the petition pointed out, petitioners were not able to present the instant argument to that court on the original appeal. Thus, if this Court denies review, this important issue will not have been considered or decided on the merits by *any court*. Now, an additional event has occurred that also was never considered by the court of appeals and that requires — at the very least — a remand to that court: the government has now in effect conceded — for the first time — that the decision of the court of appeals has created "an inconsistent verdict." Even if the government were correct that the creation of an inconsistent verdict by the court of appeals in this case does not warrant plenary review by this Court, that result surely *does* warrant — at the very least — reconsideration by the court of appeals. The court of appeals might very well conclude that it should not affirm a conviction which the government concedes has the effect of creating an inconsistency with that court's reversal of the other counts.

It remains the IFC defendants' basic contention, however, that this case is ideally suited for plenary review by this Court on the recurring and important issue presented in their petition for certiorari and in the instant reply.

Respectfully submitted,

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